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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 166

D. L. PIAZZA COMPANY, a partnership composed of DAVID L. PIAZZA, SAMUEL L. PIAZZA and PROVIDENCE PIAZZA, co-partners,

Petitioner,

vs.

WEST COAST LINE, INC. a corporation, WESSEL, DUVAL & CO., INC., a corporation, J. LAURITZEN, a partnership of Copenhagen, Denmark, and UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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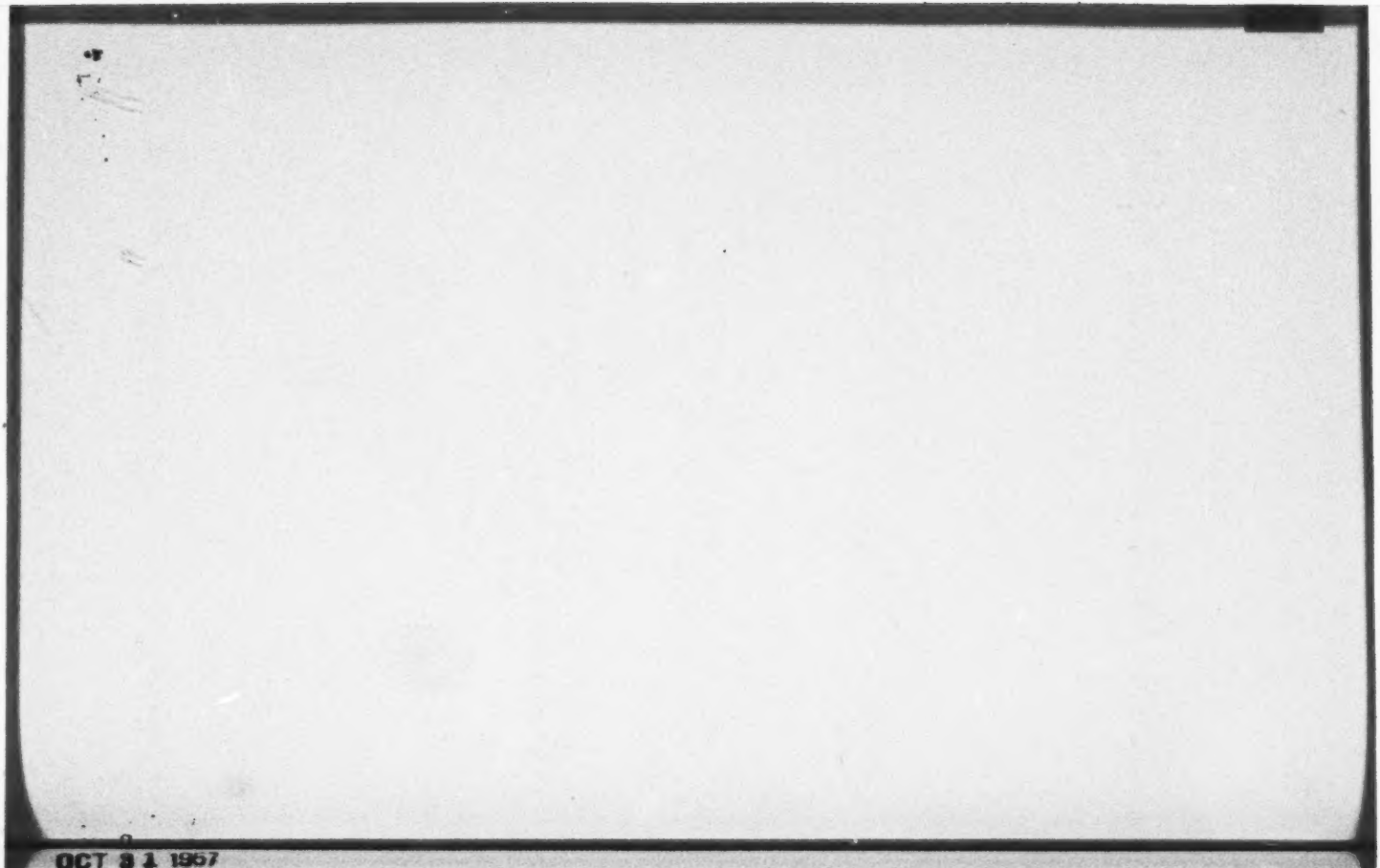
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WEST COAST LINE, INC. a corporation, WESSEL, DUVAL & CO., INC., a corporation, J. LAURITZEN, a partnership of Copenhagen, Denmark, and UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled cause on March 2, 1954 (R. 77-78), and, to review that court's order of March 26, 1954 (R. 86) denying a petition for rehearing.

OPINIONS BELOW.

The opinion of the United States District Court of the Southern District of New York (R. 60-68) is reported in 113 F. Supp. 193. The opinion of the Court of Appeals has not as yet been reported. It is printed in the Record at pages 76 to 77 inclusive.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 2, 1954 (R. 77-78). A petition for rehearing filed on March 17, 1954 (R. 79) was denied on March 26, 1954 (R. 86). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED.

1. Does Section 2 of the Judicial Review Act if construed, as by the courts below, to confine shippers to review in United States Courts of Appeal of administrative determinations against them in *reparations* cases deprive shippers seeking money damages for past wrongs of jury trial contrary to the VIIth Amendment?[1]

2. Does such a construction of Section 2 of the Judicial Review Act forbidding shippers review of administrative orders denying reparations in a one-judge district court where they may have a jury—although under Section 30 of the Shipping Act carriers may have one-judge district court review with a jury when the shipper seeks enforcement of a reparations order—constitute so gross and baseless a discrimination as to deprive shippers of due process of law under the Vth Amendment?[2]

[1] Section 2 of the Judicial Review Act (5 U.S.C. 1032) is printed at p. 5 and in the Appendix at p. 4a.

[2] Section 30 of the Shipping Act (46 U.S.C. 829) is printed at p. 4 and in the Appendix at p. 1a.

3. Did Section 31 of the Shipping Act, providing for review of orders of the administrator of the Shipping Act by the same procedure in courts of the United States as in suits brought to review orders of the Interstate Commerce Commission "except as otherwise provided" leave shippers free to attack orders of the administrator denying reparations as "otherwise provided" in the Judicial Code, Sections 1331 and 1332 of Title 28, and in Section 30 of the Shipping Act; and did Section 2 of the Judicial Review Act, providing for review by United States Courts of Appeal of all administrative orders formerly subject to review pursuant to the provisions of said Section 31 (which states "except as otherwise provided") deprive the district courts of any such jurisdiction as they had under the Judicial Code and Section 30 of the Shipping Act?[3]

4. Does the correct interpretation of Section 30 of the Shipping Act require that it shall be applied to permit reparations proceedings in a one-judge district court (where a jury may be had and the findings of the administrator receive *prima facie* effect) whether the plaintiff challenges, or relies on, the administrative result?

5. Does the doctrine of the primary and preliminary jurisdiction of the administrative agency, warrant complete elimination at every stage of the administrative and review proceedings, of jury trial of all claims for money damages?

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[3] Section 31 of the Shipping Act (46 U.S.C. 830) is printed in the Appendix at p. 2a; and Sections 1331 and 1332 of Title 28 are printed in the Appendix at p. 5a.

STATUTES INVOLVED.

Section 30 of the Shipping Act of 1916, as amended (46 U.S.C. 829) provides:

"In case of violation of any order of the commission for the payment of money the person to whom such award was made may file in the district court for the district in which such person resides, or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United States having jurisdiction of the parties, a petition or suit setting forth briefly the causes for which he claims damages and the order of the commission in the premises.

"In the district court the findings and order of the commission shall be *prima facie* evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

"All parties in whose favor the commission has made an award of reparation by a single order may be joined as plaintiffs and all other parties to such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

"No petition or suit for the enforcement of an order for the payment of money shall be maintained unless filed within one year from the date of the order."

The parallel provisions of the Interstate Commerce Act, are as follows (49 U.S.C. 16 (2)):

> "If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be *prima facie* of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

Section 2 of the Judicial Review Act of 1950 (5 U.S.C. 1032) provides:

> "The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, * * * (c) such final orders of the * * * Federal Maritime Board * * * entered under authority of the Shipping Act, 1916, as amended, * * * as are now subject to judicial review pursuant to the provisions of section 830 of Title 46 [section 31, Shipping Act, 1916, as amended] * * *"

Other pertinent provisions of the Shipping Act of 1916, the Interstate Commerce Act and Titles 5 and 28 the

United States Code are printed in the Appendix, *infra* pp. 1a to 6a.

STATEMENT OF THE CASE.

The petitioner, D. L. Piazza Company, on May 5, 1948, filed with the respondent, Federal Maritime Board's predecessor, the United States Maritime Commission, its complaint alleging that the West Coast Line, Inc., Wessel, Duval & Co., Inc. and J. Lauritzen (sometimes hereinafter referred to as "private respondents") had entered into an oral charter party with the petitioner whereby the petitioner was to have exclusive use of the vessel Argentinian Reefer for a direct voyage from Valparaiso, Chile, to New York; and that the private respondents failed to perform their obligation with respect to the oral charter party agreement, whereby the rates and charges made and collected by them for the services that were performed were discriminatory, prejudicial and unfair to the petitioner and in violation of Sections 14, 16 and 17 of the Shipping Act of 1916, as amended, (46 U.S.C. 812, 815 and 816). The petitioner sought in the proceedings before the administrative regulatory body the sum of $51,132.69 with interest as an award of reparations for unlawful rates and charges collected by the private respondents. (R. 5-7)

On December 11, 1951, the Federal Maritime Board entered an order denying reparations to the petitioner as respects the respondents, West Coast Line, Inc. and Wessel, Duval & Co., Inc., and limiting the amount of reparations awarded to the petitioner to $2500, to be recovered from the respondent, J. Lauritzen. (R. 33-35) The tender of that amount on behalf of J. Lauritzen was returned by the petitioner and on December 10, 1952, and within the one-year statutory provision established by Section 30 of

the Shipping Act of 1916, as amended, (46 U.S.C. 829), the petitioner instituted an action in the United States District Court for the Southern District of New York demanding judgment against the private respondents in the sum of $51,132.69, together with interest and its reasonable attorneys' fees and expenses, and the complaint filed by the petitioner prayed further that upon the entry of the judgment so demanded, the erroneous reparation order referred to be set aside. (R. 3-12).

The complaint filed in the District Court invoked the jurisdiction of the court under Sections 1331 and 1332 of Title 28 of the United States Code and Section 30 of the Shipping Act of 1916, as amended (R. 4) and recited the allegations upon which the proceedings before the Federal Maritime Board was based, stating (as did the complaint in the proceedings before the Federal Maritime Board) that the private respondents resorted to unfair and discriminatory methods, under a fraudulent pretense holding out and insisting upon a exclusive use charter party at rates highly in excess of applicable liner service rates, and that although such rates were paid by petitioner, the respondent carriers rendered liner service with ensuing deviation rather than the exclusive, direct voyage promised (R. 5, 6, 7); and that by reason of the premises, the private respondents and each of them became and are liable to the petitioner in the sums of $48,632.69 as overcharge of freight and $2500 wrongfully retained as demurrage and unrefunded to petitioner (R. 7-8). The complaint then recited the proceedings had and orders entered by the Federal Maritime Board (R. 8-10), and the complaint set forth the particulars which render the findings and orders of the Federal Maritime Board erroneous (R. 10-12). The complaint in the District Court concluded with a demand for judgment against

the private respondents in the sum $51,132.69, together with interest and attorneys' fees and expenses, and further prayed that upon the entry of judgment so demanded, the orders of the Federal Maritime Board be set aside.

On motion of respondents, United States and the Federal Maritime Board, the District Court dismissed the complaint for lack of jurisdiction, 13 F. Supp. 193 (R. 69-70), and on March 2, 1954, the Court of Appeals affirmed the judgment dismissing the complaint (R. 77-78). A petition for rehearing was duly filed on March 17, 1954 (R. 79-84) wherein the attention of the Court of Appeals was again directed to the constitutional issues raised by its construction of the legislation involved, whereby the parties were deprived of the right of trial by jury (R. 82-84). The petition for rehearing was denied *per curiam* on March 26, 1954 (R. 85).

SPECIFICATION OF ERRORS TO BE URGED.

1. The courts below erred in that their conclusions and holdings that Section 2 of the Judicial Review Act is applicable and vests exclusive jurisdiction of an administrative determination against shippers in reparations cases render the legislation involved unconstitutional on two separate grounds:

   (a) By depriving shippers seeking money damages for past wrongs of jury trial contrary to the Seventh Amendment; and

   (b) By permitting a gross and baseless discrimination depriving shippers of due process of law under the Fifth Amendment.

2. The Courts below erred in holding that an order denying a shipper reparations comes within the meaning of Section 31 of the Shipping Act and that the Court of Appeals has exclusive jurisdiction of the review of such

orders under Section 1032 of Title 5 of the United States Code. The "exclusive" feature of the Judicial Review Act's grant of jurisdiction to the Courts of Appeal, since it covers into that statute "the except as otherwise provided" clause of Section 31 of the Shipping Act, must be understood to refer to administrative orders prescribing future conduct, not awards of damages for past wrongs.

3. The Courts below erred in their conclusions and holdings that petitioner may not proceed in the District Court under Section 30 of the Shipping Act to challenge the administrative order denying a shipper reparations, whereas a shipper may so proceed in a reparations proceeding under parallel legislative provisions of the Interstate Commerce Act.

4. The Courts below erred in failing to hold that independent of the provisions of Section 30 of the Shipping Act, the District Court does have jurisdiction of the subject matter of the action to recover reparations under Sections 1331 and 1332 of Title 28 of the United States Code.

REASONS FOR GRANTING THE WRIT.

1. **The Court of Appeals has construed the statutes—not in a way that will render them valid—but in the way that involves unconstitutional deprivation of the right of jury trial to which the parties to reparation proceedings are entitled under the Seventh Amendment to the Federal Constitution, and that permits such palpable discrimination against a shipper challenging the administrative order as to be violative of the Due Process Clause of the Fifth Amendment to the Federal Constitution.**

A. The Seventh Amendment Question.

The Court of Appeals' holding that jurisdiction now lies exclusively in the Court of Appeals clearly says that

prior to the enactment of the Judicial Review Act, petitioner "could proceed in the district court following the procedure outlined in *United States* v. *I. C. C., supra*" (R. 82) (337 U. S. 426)—where the parties were entitled to a trial by jury[4]—but that the enactment of the Judicial Review Act deprives the shipper seeking reparations of the right to such trial. It is plain that such construction of the Judicial Review Act renders it an unconstitutional deprivation of the right to trial by jury (United States Constitution, Amendment VII) when, as here, the suit is for recovery of money damages."[5]

Even the Judicial Review Act on which the Court of Appeals bases its opinion does not provide for judicial review of proceedings in the Court of Appeals in all cases arising under the Shipping Act. It provides for such proceedings in the Court of Appeals "except as otherwise provided".[6] This exception is undeniably addressed to proceedings for reparation seeking to enforce administrative action by Section 30. And under this Court's decision in *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, it is addressed equally to reparations pro-

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[4] See Baltimore & Ohio R. Co. v. Brady, 288 U. S. 448, 458 where this Court in recognizing the constitutional right of trial by jury for shipper and carrier alike, pointed out that Congress under Section 9 of the Interstate Commerce Act gave the shipper the option to seek reparations in the first instance before the District Court where he could have a trial by jury, or before the administrator. Section 22 of the Shipping Act (46 U. S. C. 821) gives no such election, but only allows the shipper in all cases, to proceed first before the Board.

[5] This point was raised before the Court of Appeals by brief and argument. The opinion (R. 74-77) makes no mention whatsoever of this vital and fundamental issue. The petition for rehearing again pointedly raised the Constitutional issue (R. 82-83), but resulted in nothing more than a per curiam denial of the petition. This Court should give this issue the consideration that the Court of Appeals apparently failed to do.

[6] The section of the Judicial Review Act relied on by the court below (5 U. S. C. 1032) applies only to such Board orders "as are now subject to judicial review pursuant to the provisions of section 830 of Title 46 (Section 31 of the Shipping Act)." Section 830 of Title 46 (Section 31 of the Shipping Act) contains the explicit language of exclusion: "except as otherwise provided."

ceedings that challenge administrative action, "for actions to enforce Commission orders awarding reparation, and actions to challenge Commission orders denying reparations, basically involve the same claims for money damages, and the same statutes. We think the order in both cases should be reviewed by the same one-judge tribunal." (337 U. S. at 443).

Unless this Court's construction is followed, the statutes would work an unconstitutional denial of the right to jury trial under the Seventh Amendment to the Federal Constitution. The Court of Appeals states with reference to the Judicial Review Act that "the language of the statute is broad and * * * [petitioner] has not shown us that Congress intended to exempt this type of case from the operation of the statute." (R. 77). *But* as was recently stated, "when a federal statute embraces a common-law form of action, that action does not lose its identity merely because it finds itself enmeshed in a statute. The right of trial by jury in an action for debt still prevails whatever modern name may be applied to the action. *To hold otherwise would be to open the way for Congress to nullify the Constitutional right of trial by jury by mere statutory enactment.* It is by such methods that courts lose their power to enforce the Bill of Rights." *U. S.* v. *Jepson*, 90 F. Supp. 983, 986 (Our emphasis).

The Shipping Act gives and codifies many rights that sound only at common law. See: 46 U.S.C. §§ 812, 815, 816; *The Thames*, 10 Fed. 848; *Williams* v. *Providence Washington Ins. Co.*, 56 Fed. 159, 160 (Addison Brown, J.). Promissory misrepresentation where monies have been obtained by fraudulent pretense is actionable at law. *Kaufman* v. *John Block & Co.*, 60 F. Supp. 992, 993 (S. D. N.Y. 1945). The complaint herein recites (as did the com-

plaint in the proceedings before the Board) that the respondent carriers resorted to unfair and discriminatory methods, under a fraudulent pretense holding out and insisting upon an exclusive use charter party at rates highly in excess of applicable liner service rates, and that although such rates were paid by petitioner, the respondent carriers rendered liner service with ensuing deviation rather than the exclusive, direct voyage promised. (R. 5, 6, 7). Such fraudulent inducement by representations of future conduct that are mere pretense, which are not, and never were, intended to be kept, is actionable at law. (Auth. cit.) The fact that the Shipping Act does not give the shipper the election to proceed at law in the first instance without preliminary recourse to the Board cannot deprive the shipper of his constitutional right of trial by jury. See: *Baltimore & Ohio R. Co.* v. *Brady,* 288 U. S. 448, 458; *U. S.* v. *Jepson,* 90 F. Supp. 983, 986.

The construction by the Court of Appeals of the Judicial Review Act accomplishes that forbidden result and ignores the cardinal principle of statutory construction repeatedly enunciated by this Court that "when the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson,* 285 U. S. 22, 62 and see also *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288.

To construe the Judicial Review Act (5 U.S.C. 1032) so as to deprive the parties of their constitutional right to a jury trial in reparations proceedings, proceedings to recover money damages for past wrongs, renders that act plainly unconstitutional. Such construction, that the

Court of Appeals adopted, ignores both the explicit language of exclusion of the legislation itself (*supra* p. 10) and the clearly constitutional alternative spelled out by this Court in *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 443, that where "the root of the controversy concerns the payment of money damages," the same one-judge tribunal where the parties can be afforded a jury trial should review the administrative agencies' orders—whether the administrative order awards or denies money damages.

B. The Fifth Amendment Question.

Furthermore, the statutes as construed by the Court of Appeals deny to the *shipper* who attacks the administrative order all right to jury trial in any kind of case, including any reparations claim. (R. 76-77) But the statutes plainly give the *carrier* against whom the shipper would enforce exactly the same reparations claim, the right to review in a one-judge District Court of a reparations claim, where he may have a trial by jury, and introduce new evidence. (Shipping Act, Section 30)[6]

So construed, the statutes simply give carriers against whom reparations are sought the right to a jury trial and the introduction of new evidence, after an administrative determination against them of a reparations claim—and deny to shippers either of those rights when exactly the same claim is administratively determined adversely to *them*, on exactly the same law, issues and evidence.[7]

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[6] And see **Lehigh Valley R. Co. v. Clark**, 207 Fed. 717, under the Interstate Commerce Act.

[7] It will be borne in mind that while Section 9 of the Interstate Commerce Act expressly allows a shipper to elect between an administrative and a judicial remedy (**Baltimore & Ohio R. Co. v. Brady**, 288 U. S. 448, 458) the Shipping Act gives no such election, but requires shippers claiming reparations to resort to the administrator in the first instance in all cases. (Shipping Act, Section 22.)

The discrimination is palpable, gross and unrelated to any objective that the federal government is authorized to seek. It would give to carriers an advantage in attacking adverse administrative orders in reparations cases, that would be denied to shippers, although regardless of whether the administrator goes against the carrier or the shipper the case involves the same law, the same issues, the same parties, the same evidence—is, in short, the same case. Under the construction of the statutes adopted below, when the carrier wins before the administrator the carrier's short path to finality of the determination in his favor would lie through the Court of Appeals alone; whereas if the shipper chanced to prevail before the administrator[8] on the identical case, the shipper would be forced to meet the carrier again in the District Court forum with a jury trial, submit to new evidence, and, finally, an appeal to the Court of Appeals.

Such palpable, gross and baseless discrimination against shippers and in favor of carriers, in exactly the same cases, cannot be shrugged off as the expression of sovereign will; for, as stated most recently by Mr. Chief Justice Warren speaking for the court in *Bolling* v. *Sharpe*, ... U. S. ....., 74 S. Ct. 693, 694 (May 17, 1954): "[T]his Court has recognized, discrimination may be so unjustifiable as to be violative of due process," (Cit. Auth.) There is no justification for sending shippers and carriers to different courts and subjecting them to different judicial processes in the same case, depending solely on who prevails before the administrator.

To construe the legislation involved so as to result in such discrimination as to be violative of due process renders the legislation plainly unconstitutional. Such con-

[8] See Jaffe, The Effective Limits of the Administrative Process, 67 Harvard Law Review, 1107 et seq.

struction ignores the clearly constitutional alternative spelled out by this Court in *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 443: "For actions to enforce Commission orders awarding reparation, and actions to challenge Commission orders denying reparations, basically involve the same parties, the same disputes, the same claims for money damages, and the same statutes. We think the orders in both instances should be reviewed in the same one-judge tribunal."

2. The Court of Appeals has decided important federal questions in a way that is probably in conflict with applicable decisions of this Court.

A. This Court has held that under section 16 (2) of the Interstate Commerce Act—which has its exact parallel in Section 30 of the Shipping Act on which we rely—that the District Court does have jurisdiction of suits by shippers seeking reparations that challenge the administrative order.

The Court of Appeals, in holding that "without more, appellant [petitioner] could proceed in the district court following the procedure outlined in *United States* v. *I. C. C.*" (337 U.S. 426) yet the subsequent enactment of the Judicial Review Act (5 U. S. C. § 1032) "gives the Court of Appeals exclusive jurisdiction to review such orders" (R. 76, 77), misapprehends and is in direct conflict with the holding of this Court in *United States* v. *Interstate Commerce Commission*, 337 U.S. 426. That case holds that a reparations proceeding is one where "the root of the controversy concerns the payment of money damages" (327 U.S. at 443) and that whether the subsequent judicial proceedings be to enforce an order for the payment of such money damages, or to review, as in the instant case, a denial of such damages, "the orders in both instances should be reviewed in the same one-judge tribunal" (337 U.S. at 443).

The Court of Appeals attempted to distinguish *United States* v. *Interstate Commerce Commission*, 337 U.S. 426 by stating that this Court there "based its decision on 28 U.S.C. § 41 (28), (now § 1336), the general statutory provision providing for a review of I. C. C. orders." (R. 76). The Court of Appeals then reasoned that this Court in the case of *United States* v. *Interstate Commerce Commission, supra,* "found the normal (*sic.*) three judge district court requirement unnecessary in view of the one judge requirement for enforcement of awards under 49 U.S.C. § 16 (2)." (R. 76) The Court of Appeals then reached the conclusion that although the one-judge tribunal was thus authorized by § 16 (2) of the Interstate Commerce Act, jurisdiction did not flow therefrom (R. 76) and therefore concluded that Section 30 of the Shipping Act establishing the same procedures as respects reparations proceedings did not provide the one-judge tribunal for a shipper proceeding under the Shipping Act whereas this Court has held that such a tribunal is the proper tribunal for a shipper under the Interstate Commerce Act to challenge a denial of reparations.[9]

The District Court lapsed into similar erroneous reasoning in attempting to distinguish this Court's holding in *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, except that the errors are more plainly spelled out in the District Court's opinion (R. 61-68.) The District Court's reasoning was first, that the provisions

[9] It has been repeatedly held that the provisions of the Shipping Act and the Interstate Commerce Act are closely parallel in general scope and purpose, as well as in terms; Compare Section 30 of the Shipping Act, upon which petitioner relies, and Section 16 (2) of the Interstate Commerce Act (which this Court in the I.C.C. case, supra, 337 U. S. 426, held provided the proper one-judge tribunal to challenge an administrative denial of reparations), and manifest an intent that the two Acts, each in its own field, should have like interpretation, application and effect. United States Navigation Co. v. Cunard S.S. Co., 284 U. S. 474, 481; Inter-Island Steam Navigation Co. v. Terr. of Hawaii, 30 U.S. 306, 312; H. Rep. No. 659, 64th Cong., 1st Sess. (1916), pp. 32, 33.

of Section 30 of the Shipping Act (for a one-judge court, on which we rely) and the parallel provisions of Section 16 (2) of the Interstate Commerce Act speak only of *enforcement* of the orders of administrative agencies. The District Court then reasoned that to apply them to challenge such orders would "require a construction of the words of the section that I do not think they can bear" (R. 63).

The District Court then proceeded (as the Court of Appeals also erroneously did) to find jurisdiction to entertain proceedings that *challenge* administrative determination reached under the Interstate Commerce Act on one isolated section of another statute, the Urgent Deficiencies Act, *but* that section merely says that challenge shall be allowed—without stating whether that jurisdiction should be in one kind of court or another (28 U. S. C. 1336, quoted in Appendix). A plain trouble with the reasoning below is that in the *I. C. C.* case, *supra*, this Court was, as indeed the District Court in its opinion puts it, "faced with the fact that 28 U.S.C. (1946 ed.) § 41 (28) [now 1336—the section on which both the lower courts predicated jurisdiction] which authorized (*sic.*) the proceeding was derived from the Urgent Deficiencies Act, 38 Stat. 208, 219, 220, *which provides for a three-judge district court.*" (R. 64) The point is that the only proceeding "authorized" by the Urgent Deficiencies Act is, indeed, a three-judge court—with no jury and no new evidence—whereas this Court, as even the District Court stated "*nevertheless held that it should be before a single-judge district court.*" (R. 64).

The District Court's error is plain in its assumption that it was the Urgent Deficiencies Act that "authorized the proceeding"—whereas that Act did *not* authorize the one-judge proceeding for which this Court held there was

jurisdiction. The *only* statute giving jurisdiction to a one-judge district court (with new evidence and a jury) was Section 16 (2) of the Interstate Commerce Act that verbally, provides a one-judge district court for enforcement of administrative orders—but which this Court held equally to give jurisdiction for proceedings *challenging* such orders.

Indeed, contrary to the District Court's statement (R. 64), the Urgent Deficiencies Act from which it culls 28 U.S.C. 41 (28) (now 1336) did *not* "authorize" a proceeding before a one-judge district court. To say that the Urgent Deficiencies Act "authorized" a proceeding before a one-judge district court is to put on *that* statute a construction "that its language cannot bear." The *only* statute giving jurisdiction to a *one-judge* district court is the statute which—while it speaks verbally of "enforcement" of the administrative order—was held by this Court in the case of *United States* v. *Interstate Commerce Commission,* 337 U.S. 426, to be the statute applicable to suits by shippers seeking reparations that *challenge* the administrative order.

There was, in short, nothing in all these statutes which "authorized the proceeding" for which this Court held there was jurisdiction except the statute under which it held the parties *should* proceed, namely, the one-judge court statute (Interstate Commerce Act, Sec. 16(2))—which has its exact parallel in Section 30 of the Shipping Act, and on which we rely.

The deliberate parallelism of Section 30 of the Shipping Act and Section 16(2) of the Interstate Commerce Act is too apparent for denial. If the one is not limited merely to enforcement of the administrative orders as this Court certainly and undeniably held, neither is the

other. It is in Section 16(2) of the Interstate Commerce Act—*and there only*—that power in a one-judge district court was found by this Court to attack the administrator's order. The same power must arise in the parallel Section 30 of the Shipping Act which the Court of Appeals failed to recognize (R. 76).

B. This Court's long-standing distinction between administrative orders involving prescription of future conduct and those arising in proceedings for money damages is overlooked by the decision of the Court of Appeals—a distinction that is fundamental in the proper interpretation of the legislation involved.

(1) The Shipping Act, Section 31, Question.

The distinction has long been made between the review of administrative proceedings involving prescription of future conduct, which are in essence of legislative character, and the review of proceedings involving the right to money damages. *Arizona Grocery Co.* v. *A. T. & S. F. Ry. Co.*, 284 U.S. 370, 385-386. The first is in its nature a public matter and the second is private *Baer Bros. Mercantile Co.* v. *D. & R. G. R.R. Co.*, 233 U.S. 479, 491. This Court plainly recognized that distinction in *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, by holding that a review of the denial of reparations should be not by a three-judge court but by a one-judge court. This is a recognition of the same distinction as made by Congress in spelling out such review procedures in Section 16(2) of the Interstate Commerce Act—a distinction that was carried over in the enactment of Section 30 of the Shipping Act.

The courts below rely on the assertion that in the *United States* v. *Interstate Commerce Commission* case, *supra*, the only statutory provision involved that dealt specifically with judicial review of Commission orders

under which an order denying reparations would fall was a statute that was different from the enforcement provisions of Section 16(2) of the Interstate Commerce Act, namely, the Urgent Deficiencies Act, providing for judicial review before district courts (28 U.S.C. 2325)—which acted without a jury on the record made before the administrator, and that alone. *Louisville & Nashville R.R. Co.* v. *United States,* 245 U.S. 462, 466.

But this Court did not read the provisions of the Urgent Deficiencies Act alone, but coupled those provisions with the enforcement provisions of the Interstate Commerce Act as respects Commission reparation awards (337 U.S. at 442), and concluded that the true intent of this legislation was to lodge power in a one-judge district court which proceeds with a jury to review orders denying reparations—this though the Interstate Commerce Act speaks only of such review of orders granting reparations, and the Urgent Deficiencies Act (the only specific statutory reference to judicial review of other orders of the Commission) provides for a special three-judge court that acts, without a jury, on the record made before the administrator. Yet it is evident that to give an interpretation of this legislation that would give one-judge review (with a jury) to the carrier against whom the Commission had awarded reparations but would give only three-judge review (without a jury) to the shipper to whom the administrator denied reparations, would be to infect the legislation with two constitutional infirmities (*supra,* pp. 9-15).

The Interstate Commerce Act, dealing with domestic commerce, is the prototype of the later Shipping Act, dealing with foreign commerce (auth. cit.) with one significant exception: the Shipping Act did not recognize an election to proceed in the first instance before a court for reparations against a carrier, but required preliminary resort to the administrator (Shipping Act, Section 22).

The Shipping Act carried a provision for judicial review of administrative orders granting reparations (by a one-judge distict court that proceeds with a jury) exactly parallel to that of the Interstate Commerce Act (Shipping Act, Section 30; Interstate Commerce Act, Section 16(2)).

The Shipping Act then further provided that, "except as otherwise provided", review of administrative orders should be the same as review of Interstate Commerce Commission orders (Shipping Act, Section 31).

Even the Court of Appeals recognizes and says that petitioner "without more * * * could proceed in the district court following the procedure outlined in *United States* v. *I.C.C., supra.*" (R. 76)

In this situation Congress enacted the Judicial Review Act of 1950. *But* that statute leaves untouched the provisions of Section 30 of the Shipping Act paralleling Section 16(2) of the Interstate Commerce Act—the provisions that give the carrier a right to a jury trial when the shipper seeks to enforce an administrative award against the carrier. As to Section 31 of the Shipping Act, the Judicial Review Act provides that thenceforth all matters previously reviewable under Section 31 of the Shipping Act should be reviewable exclusively in the Court of Appeals. To hold, as the courts below did, that this confines the shipper challenging an administrative denial of reparations to a review in the Court of Appeals without a jury, and without the right to introduce new evidence, not only subjects that legislation to the constitutional infirmities discussed (*supra*, pp. 9-15) but also ignores the plain fact that the Judicial Review Act itself carries into that statute the "except as otherwise provided" clause of Section 31 of the Shipping Act. This Court's holding in *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, makes

it equally plain that this explicit language confines the scope of the Shipping Act to administrative orders prescribing future conduct, not awards of damages for past wrongs.

(2) The Question of Jurisdiction under the Judicial Code, Independent of the Shipping Act.

Furthermore, the failure of the Court of Appeals to recognize this Court's holding in the case of *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, at 443, that in a reparation proceeding "the root of the controversy concerns the payment of money damages" results in that court's further confusing such a situation, namely, a reparations proceeding—wherein the "'basic" matter is the shipper's right to recover money damages, as this Court puts it—with the totally different situation in which the only relief sought is *quia timet*, to enjoin official action. It has been long recognized that the reparations proceeding before the administrative regulatory body simply constitutes a compliance with doctrine of exhaustion of the shipper's administrative remedies and the Court of Appeals for the Third Circuit in *Lehigh Valley R. Co.* v. *Clark*, 207 Fed. 717, at 721, most aptly described the proceeding before the administrative body "as a necessary condition precedent to the bringing of the action". The ultimate remedy can be had only by a suit at law. *Interstate Commerce Commission* v. *Western New York & P. R. Co.*, 82 Fed. 192, 196. The complaint in the District Court sets forth the necessary jurisdictional allegations to maintain such an action at law. (R. 4, 6) The Court of Appeals is in direct conflict with the Third Circuit's decision in the case of *Lehigh Valley R. Co.* v. *Clark*, *supra*, in confusing the distinction between primary jurisdiction with respect to the administrator's right to pre-

scribe future action[10] and preliminary jurisdiction as respects the right to recover money damages. It erroneously concluded that there was no jurisdiction in the district court under 28 U.S.C. §§ 1331, 1332 even where it is plain that the claim of the petitioner is "for damages for alleged wrongs already committed" and where it has long been established that to such a claimant "a suit at law affords a plain adequate and complete remedy." *Interstate Commerce Commission* v. *Western New York & P. R. Co.*, 82 Fed. 192, at 196.

(3) The questions presented are of primary importance in the interpretation of the Shipping Act of 1916, as amended.

Examination of the Shipping Act and the Interstate Commerce Act discloses that one is, as this Court calls it the prototype of the other.[11] "The Shiping Act was fashioned after the Interstate Commerce Act." *Compagnie, etc.* v. *American Tobacco Co.*, 31 F. 2d 663, 667, (C.A. 2, 1929). Where the one deals with domestic commerce through the Interstate Commerce Commission, the other deals with foreign commerce through the Federal Maritime Board. Nowhere is this parallelism more striking *and* compelling than in the provisions for reparations. In the work cited (Robinson, *Admiralty* (1939 ed.) the discussion of "The shipper's remedies for discrimination" concludes with reference to and quotation from this Court's decision in *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 481, and most pointedly states:

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[10] Neither United States Navigation Co. v. Cunard S.S. Co., 284 U. S. 474 nor Far East Conference v. United States, 342 U. S. 570, cited by the Court of Appeals (R. 75) had anything to do with the recovery of money damages. They involved wholly different proceedings in which the only relief sought sounded in equity.

[11] Robinson, Admiralty (1939 ed.) p. 478 et seq.

> "After reciting the provisions of the Shipping Act, the [Supreme] court said: 'These and other provisions * * * clearly exhibit the close parallelism between the Act and its prototype the Interstate Commerce Act, and the applicability to both of like principles of construction and administration.' Thus the analogies with the Interstate Commerce Act are the solution of similar questions under the acts which seek to enforce the water carrier's common law or statutory duties to serve, so far as discriminations among individual customers are concerned."
>
> Robinson, *Admiralty*, (1939 ed.) pp. 487-488.

The Court of Appeals misconceives the significance of its statement that "jurisdiction" in the case of *United States* v. *Interstate Commerce Commission*, 337 U. S. 426 was not founded on the enforcement provisions of Section 16 (2) of the Interstate Commerce Act (R. 76). The same anomalies that would arise under Section 16 (2) of the Interstate Commerce Act if that were limited by a mere verbal construction to *enforcement* of administrative orders (a construction which this Court rejected) would equally arise if the parallel Section 30 of the Shipping Act were so limited (a construction which the Court of Appeals adopts when it states that "[petitioner's] argument based on Section 30 of the Shipping Act thus falls" (R. 76).

But it is plain that where reparations are sought, the suit that relies on, and the suit that attacks, the administrative result, basically involve the same parties, the same claims for money damages, and the same statutes, as this Court aptly stated in *United States* v. *Interstate Commerce Commission*, 337 U. S. 426 at 443, concluding:

"We think the orders in both instances should be reviewed by the same one-judge tribunal." [12]

Yet under such circumstances the decision of the Court of Appeals would give to the plaintiff who in seeking reparations relies upon an administrative order (and to the carrier who challenges that order) a one-judge district court trial (with a jury and the right to introduce additional evidence [13]) but would deny such advantage to the plaintiff shipper, who in seeking reparations, *challenges* the administrative determination and would give him only a trial before three judges, on the record made before the administrator.

There is no basis for such distinctions and that was what this Court held in *United States* v. *Interstate Commerce Commission*, 337 U. S. 426. Under parallel legistion dealing with domestic commerce that decision sets apart reparation proceedings for the recovery of money damages for trial by a one-judge court, which acts with a jury. That decision held that a one-judge district court (with new evidence and a jury) has power to act. Power to act, in that context, cannot be distinguished from jurisdiction. That decision, in the statutory situation presented, carves out the reparations proceeding from the three-judge proceeding that acts without a jury and on the administrative record alone. That was done by statutory construction. For Congress cannot be supposed to have given the plaintiff shipper who *relies on* the administrative result—and the carrier who resists that re-

[12] This Court aptly summarized the basic underlying reasons for this conclusion when it stated: "For actions to enforce Commission orders awarding reparation, and actions to challenge Commission orders denying reparations, basically involve the same parties, the same disputes, the same claims for money damages, and the same statutes." (337 U. S. at 443).

[13] See: Lehigh Valley R. Co. v. Clark, 207 Fed. 717, at 724.

sult—the advantages of a jury trial—while denying them to the plaintiff shipper who *challenges* the administrative result.

As this Court concluded in *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, at 443:

> "We are confident that in holding that one judge rather than three should entertain cases challenging Commission reparations order, we interpret the congressional expediting procedure and the Interstate Commerce Act in accordance with their basic purpose."

The decision of the Court of Appeals in construing parallel legislation and holding that the Court of Appeals has exclusive jurisdiction of such proceedings misconstrues the basic purpose of Judicial Review Act and the Shipping Act and conflicts with the construction of this Court in the case cited. Furthermore, beyond the considerations of logic and fairness supporting that construction as established by the decision of this Court, is the further consideration that any other construction would more than raise grave doubts of the constitutional validity of the legislation; it would condemn it as unconstitutional (*supra*, pp. 9-15).

The relief that petitioner sought was that prescribed by this Court in *United States* v. *Interstate Commerce Commission*, 337 U. S. 426—a procedure recognized by Congress as respects reparation proceedings—the trial by a one-judge court where the constitutional right of trial by jury is preserved to the parties—and a procedure that the decision of the Court of Appeals denies to parties coming under that legislation.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*:

Section 22 (46 U.S.C. 821):

"Any person may file with the commission a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The commission shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the commission, satisfy the complaint or answer it in writing. If the complaint is not satisfied the commission shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Commission, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

"The commission, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter."

Section 30 (46 U.S.C. 829):

"In case of violation of any order of the commission for the payment of money the person to whom such award was made may file in the district court for the district in which such person resides, or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the carrier, or in any court of general jurisdic-

tion of a State, Territory, District, or possession of the United States having jurisdiction of the parties, a petition or suit setting forth briefly the causes for which he claims damages and the order of the commission in the premises.

"In the district court the findings and order of the commission shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

"All parties in whose favor the commission has made an award of reparation by a single order may be joined as plaintiffs, and all other parties to such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

"No petition or suit for the enforcement of an order for the payment of money shall be maintained unless filed within one year from the date of the order."

Section 31 (46 U.S.C. 830):

"The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the commission shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties."

Interstate Commerce Act, 1887, 24 Stat. 379, as amended, 46 U.S.C. 1 *et seq.*:

Section 8 (49 U.S.C. 8):

"In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Section 9 (49 U.S.C. 9):

"Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. * * *"

Section 16(2) (49 U.S.C. 16(2)):

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating

office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be *prima facie* evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonabe attorney's fee, to be taxed and collected as a part of the costs of the suit."

Judicial Review Act, 1950, 64 Stat. 1129-1132, 5 U.S.C. 1031 *et seq.*:

Section 2 (5 U.S.C. 1032):

The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, * * * (c) such final orders of the * * * Federal Maritime Board * * * entered under authority of the Shipping Act, 1916, as amended, * * * as are now subject to judicial review pursuant to the provisions of section 830 of Title 46 [section 31, Shipping Act, 1916, as amended] * * *.

Section 4 (5 U.S.C. 1034):

Any party aggrieved by a final order reviewable under this chapter may, within sixty days after entry of such order, file in the court of appeals * * * a petition to review such order. * * * The action in court shall be brought against the United States. * * *

Title 28, United States Code:

§ 1331:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

§ 1332:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

(1) Citizens of different states:

(2) Citizens of a State, and foreign states or citizens or subjects thereof; * * *.

Title 28, United States Code.*

§ 1336. Interstate Commerce Commission Orders.

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

§ 2321:

"The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

"The orders, writs, and process of the district courts may, in the cases specified in this section in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States. As amended May 24, 1949, c. 139, § 115, 63 Stat. 105."

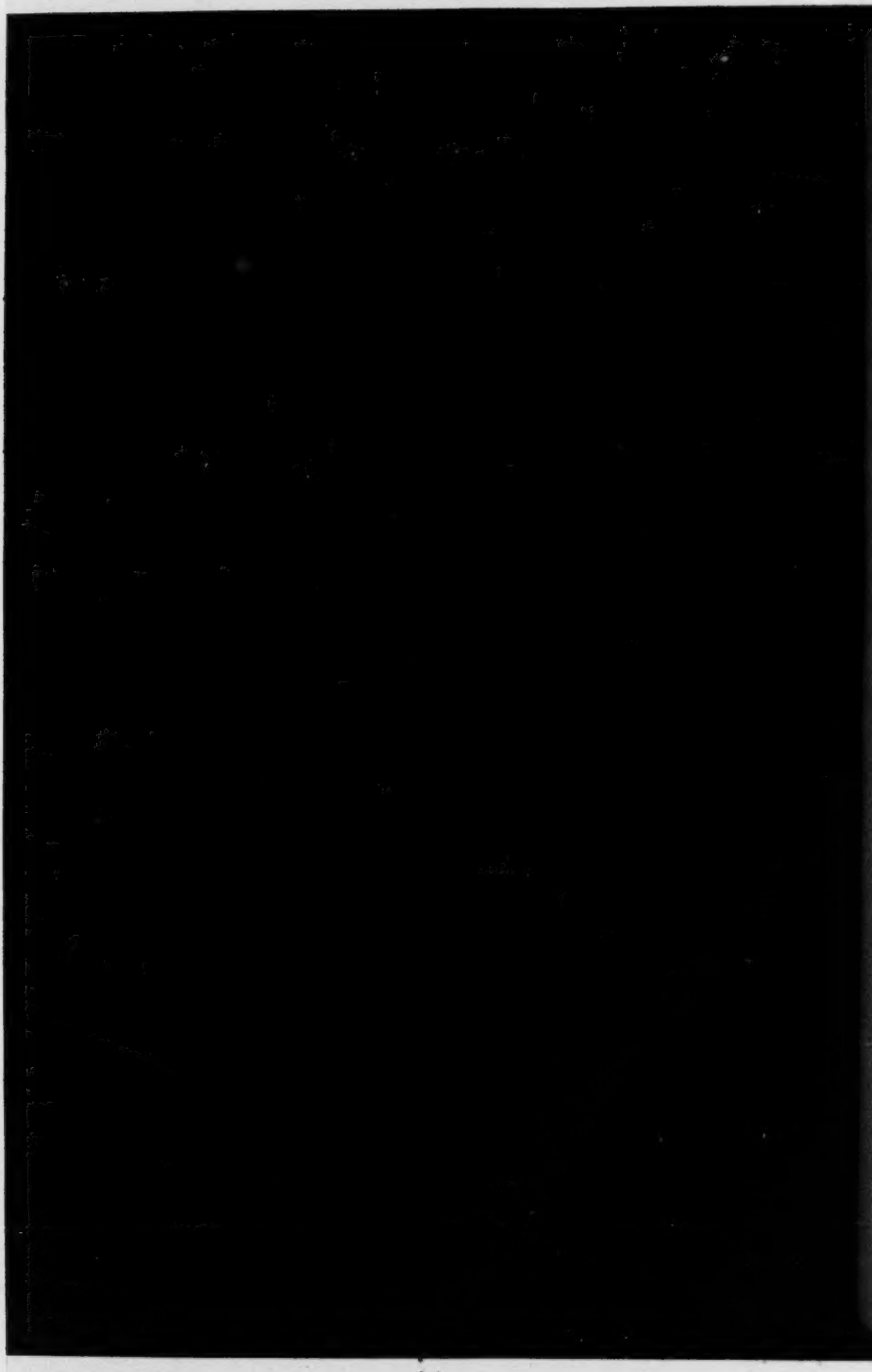
* The following sections are derived from the Urgent Deficiencies Act, 38 Stat. 208 et seq., as amended.

§ 2324:

"The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action."

§ 2325:

"The interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."



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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 166

D. L. PIAZZA COMPANY, A PARTNERSHIP COMPOSED OF DAVID L. PIAZZA, SAMUEL L. PIAZZA, AND PROVIDENCE PIAZZA, CO-PARTNERS, PETITIONER

v.

WEST COAST LINE, A CORPORATION; WESSEL, DUVAL & CO., INC., A CORPORATION; J. LAURITZEN, A PARTNERSHIP OF COPENHAGEN, DENMARK; AND UNITED STATES OF AMERICA AND FEDERAL MARITIME BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 74-77) is reported at 210 F. 2d 947. The opinion of the district court (R. 60-68) is reported at 113 F. Supp.

193. The report of the Federal Maritime Board appears at R. 13-31.

JURISDICTION

The judgment of the court of appeals (R. 77-78) was entered on March 2, 1954. A timely petition for rehearing (R. 79-84) was denied on March 26, 1954 (R. 85-86). The petition for writ of certiorari was filed on June 24, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether under the Shipping Act of 1916 and the Judicial Review Act of 1950, jurisdiction to review orders of the Federal Maritime Board denying reparations is vested exclusively in the courts of appeals.

2. If so, whether this scheme of review violates petitioner's constitutional rights.

3. Whether petitioner's complaint stated a cause of action independent of the Shipping Act which should have been entertained by the district court.

STATUTES INVOLVED

Shipping Act, 1916, 39 Stat. 728, as amended, 46 U. S. C. 801 *et seq.*:

Section 22 (46 U. S. C. 821):

> Any person may file with the [Board] a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused

thereby. * * * The [Eoard], if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

* * * * *

Section 30 (46 U. S. C. 829):

In case of violation of any order of the [Board] for the payment of money the person to whom such award was made may file in the district court * * * or in any court of general jurisdiction of a State, Territory, District, or possession of the United States having jurisdiction of the parties, a petition or suit setting forth briefly the causes for which he claims damages and the order of the [Board] in the premises.

In the district court the findings and order of the [Board] shall be prima facie evidence of the facts therein stated * * *.

* * * * *

No petition or suit for the enforcement of an order for the payment of money shall be maintained unless filed within one year from the date of the order.

Section 31 (46 U. S. C. 830):

The venue and procedure in the courts of the United States in suits brought to enforce,

suspend, or set aside, in whole or in part, any order of the [Board] shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

Judicial Review Act, 1950, 64 Stat. 1129-1132, 5 U. S. C., 1031 *et seq.*:

Section 2 (5 U. S. C. 1032):

The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, * * * (c) such final orders of the * * * Federal Maritime Board * * * entered under authority of the Shipping Act, 1916, as amended, * * * as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended.

* * * * *

Section 4 (5 U. S. C. 1034):

Any party aggrieved by a final order reviewable under this Act may, within sixty days after entry of such order, file in the court of appeals * * * a petition to review such order. * * * The action in court shall be brought against the United States. * * *

STATEMENT

In May 1948, petitioner, a shipper, instituted a proceeding before the United States Maritime Commission (predecessor to respondent Federal Maritime Board) seeking reparations pursuant to section 22 of the Shipping Act of 1916.[1] Its complaint charged that a water carrier, respondent West Coast Line, Inc., had violated various sections of the Shipping Act in the following respects: (a) by requiring petitioner to enter into an exclusive-use charter party agreement at rates in excess of regular-liner service, and then actually transporting the cargo involved via regular-liner service; (b) by unduly and unreasonably preferring other shippers whose goods were transported, on the same voyage, at regular-liner service terms; (c) by charging rates which were discriminatory in that they were greatly in excess of the regular-liner service rates generally in effect; and (d) by maintaining unreasonable and discriminatory practices as to the landing and delivery of property (R. 6-7).[2]

The Board, after a full hearing, issued a report in which it found that the agreement and rates in question were not in violation of any of the pertinent provisions of the Act, but that the carrier, in exacting a charge of $2,500 for demurrage, had

[1] The term "Board" will be used to refer either to the Federal Maritime Board or to its predecessor, the United States Maritime Commission.

[2] The provisions of the Shipping Act allegedly violated were sections 14, 16, and 17 (46 U.S.C. 812, 815, 816).

engaged in an unreasonable practice, in violation of section 17 of the Act (R. 13-31). On December 11, 1951, the Board denied both the shipper's and the carrier's motions for reargument and reconsideration, and ordered respondent J. Lauritzen to pay to the shipper, within fifteen days, reparations in the amount of $2,500 (R. 34-35). On December 17, 1951, a tender of $2,500 was made on behalf of the carrier in conformity with the Board's order. Petitioner refused to accept payment (R. 42, 62).

Petitioner filed its complaint in the district court on December 11, 1952, alleging that the Board's "report, findings and orders are erroneous, invalid, unlawful and void" (R. 10), and concluding with a prayer that it be awarded damages and that the Board's findings and orders be set aside (R. 12). The Government moved to dismiss (R. 43-44) on the ground that the action was not within the jurisdiction of the court. On June 30, 1953, the district judge (Dimock, J.) dismissed the complaint, holding that exclusive jurisdiction to review final orders of the Board is vested in the courts of appeals (R. 68).[3]

On March 2, 1954, the court of appeals affirmed

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[3] Contemporaneously with the institution of its New York suit, petitioner filed a virtually identical complaint against the same parties in the Northern District of Illinois, Eastern Division (R. 45). On October 1, 1953, that court (LaBuy, J.), without reference to Judge Dimock's earlier decision, dismissed the complaint on the same ground adopted by the New York court. *D. L. Piazza Co.* v. *West Coast Line*, 119 F. Supp. 937. Petitioner's appeal from the Illinois judgment is being held in abeyance by the Court of Appeals for the Seventh Circuit pending final disposition of the instant case.

the judgment, holding (1) that petitioner had failed to follow the exclusive remedy provided by the Shipping Act of 1916, and the Judicial Review Act of 1950 (*supra*, pp. 2-4), *i.e.*, appeal from the Board's decision to the court of appeals; (2) that section 30 of the Shipping Act was inapplicable because the jurisdiction which it confers on district courts is confined to those cases in which there has been a violation of a Board order directing the payment of money; and (3) that petitioner's complaint could not be entertained under the general jurisdiction provisions of the Judicial Code (28 U.S.C. 1331, 1332) because the Board has "exclusive primary jurisdiction" of alleged violations of the Shipping Act. The court rejected without comment petitioner's contention that this statutory scheme of review violates petitioner's constitutional rights.

ARGUMENT

Petitioner's proceeding before the Federal Maritime Board sought reparations "for alleged violations of the Shipping Act * * * resulting from discriminatory charges and practices occurring in connection with a charter party entered into between the parties" (R. 75). Its complaint to the district court, which names the United States and the Board, as well as the private parties to the charter agreement, as defendants, summarizes the complaint filed with the Board (R. 4-8), details the administrative proceedings held (R. 8-10), and challenges the validity of the Board's report and order insofar as they resulted in a denial of repara-

tions (R. 10-12).[4] The courts below have treated the action as plainly one to set aside the order of the Board.

Petitioner failed, however, to seek judicial review within the sixty-day period provided for court of appeals' review of final Board orders. See Judicial Review Act of 1950, *supra*, p. 4. Initiating its suit a full year after the Board had taken its final action, petitioner, perforce, has sought to find jurisdiction in the district court. In support of this effort, it also urges that there are constitutional objections if the scheme of review provided by the Judicial Review Act is deemed controlling.

It is our view (1) that appeal to the court of appeals constituted the exclusive method of reviewing the Board's decision; (2) that the constitutional objections raised by petitioner are without substance; and (3) that petitioner's complaint could not be entertained by the district court either under section 30 of the Shipping Act (which applies to actions to *enforce* a reparations award) or under the general jurisdiction provisions of the Judicial Code.

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[4] The Board, as noted above, awarded petitioner $2500 on one count and denied the other relief sought. The $2500 award is not in issue, it being undisputed that payment of the $2500 was tendered by the private respondents prior to the institution of this suit (Pet., p. 6). Since petitioner's grievance is limited to the failure of the Board to award the relief sought under the other counts, petitioner's position in court is precisely the same as that of a party who has been denied reparations *in toto* and seeks review of the adverse administrative determination.

1. Section 31 of the Shipping Act of 1916 states that "except as otherwise provided" the "venue and procedure" governing suits "to enforce, suspend, or set aside, in whole or in part, any order of the [Board]" shall be the same as in similar suits in respect of orders of the Interstate Commerce Commission.[5] This statutory incorporation of the procedures applicable to orders of the Interstate Commerce Commission (i.e., the procedures for district court review established by the Urgent Deficiencies Act, 38 Stat. 208, 219-220) was superseded, however, by the enactment of the Judicial Review Act of 1950. That Act declared that the several courts of appeals shall have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" such final orders of the Board as were previously "subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916 * * *."

The legislative history of the Judicial Review Act fully confirms the intention of Congress to transfer to the courts of appeals jurisdiction over all proceedings to modify or set aside Board orders. An earlier version of the Act, H. R. 2916, 81st Cong., 1st Sess., provided only that the several courts of appeals should have exclusive jurisdiction of "final orders of the [Board] entered under au-

[5] The only exceptions expressed in the Shipping Act appear in sections 29 and 30 (46 U.S.C. 828, 829), both of which relate to enforcement. Section 29 provides for suits by the Attorney General to enjoin violations of Board orders. Section 30, discussed *infra*, pp. 11-13, provides for suits by private parties to enforce unsatisfied Board awards of reparations.

thority of sections 15, 17, 18, and 19 of the Shipping Act, 1916, as amended." All other orders of the Board were to "remain unaffected * * *." Hearings before Subcommittee 2 of the House Committee on the Judiciary on H. R. 2915 and H. R. 2916, 81st Cong., 1st Sess., p. 107. Spokesmen for the Board, while agreeing with the general purposes of the bill, recommended that H. R. 2916 be broadened. They stated (*id.*, p. 145):

> * * * the provisions of the bill should be sharpened so as to make clear that the new procedure shall apply to all reviewable orders of the regulatory agencies involved * * *.
>
> * * * As it stands the bill would not apply to orders other than those issued under the specified sections of the Shipping Act, 1916, * * * and while the [Board] has not been able to make a statistical investigation to ascertain the number of orders issued under various sections of the acts administered by the [Board], it can be definitely stated that the largest number of important regulatory orders which the [Board] issues comes under section 22 of the Shipping Act, 1916. * * * *[6]

In keeping with this view, the Board offered an amendment providing for review in the courts of appeals of such final orders of the Board "as are subject to judicial review, pursuant to the provisions of section 31 of the Shipping Act, 1916 * * *."

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[6] Section 22, it should be noted, is the complaint section of the Act, pursuant to which petitioner instituted its administrative proceeding.

Id., pp. 149-150. Explaining the proposed amendment, the Board's representatives stated (*id.*, p. 150):

> That provision [section 31 of the Shipping Act, 1916] is the one which brings the orders of the [Board] under the provisions of the Urgent Deficiencies Act.
>
> This bill * * * makes those provisions applicable to reviewable orders under the Urgent Deficiencies Act.

The language ultimately adopted by Congress in the Judicial Review Act is virtually identical with that proposed by the Board.[7]

Petitioner seeks to avoid the conclusion that it was required to proceed in the court of appeals by arguing that its action was cognizable under section 30 of the Shipping Act (*supra*, p. 3), rather than under section 31. But as Judge Augustus N. Hand points out in the opinion below (R. 76), the language of that section "applies only to actions to enforce reparations awarded by the Board."

Petitioner's argument that its action may be deemed to fall within section 30 can draw no support from this Court's decision in *United States* v. *Interstate Commerce Commission*, 337 U. S. 426,

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[7] The pertinent legislative history provides no basis for distinguishing between orders denying reparations and other types of Board orders. The history contains no reference to the decision in *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, discussed below, which was decided after the completion of the hearings but prior to the issuance of the Congressional committee reports.

which involved a suit by the United States in its proprietary capacity as a shipper to set aside an order of the Interstate Commerce Commission denying it reparations. In that case the Court held that a negative reparations order issued by the Commission was "an 'order' subject to challenge under 28 U. S. C. (1946 ed.) § 41 (28)," i.e., under the Urgent Deficiencies Act.[8] As pointed out above, Federal Maritime Board orders which, prior to 1950, were reviewable under the procedures established by the Urgent Deficiencies Act were transferred by the Judicial Review Act to the jurisdiction of the several courts of appeals.

Petitioner's suggestion (Pet., p. 15 *et seq.*) that in *United States* v. *Interstate Commerce Commission,* jurisdiction to review the denial of reparations was based on section 16 (2) of the Interstate Commerce Act (the enforcement provision which is the analogue of section 30 of the Shipping Act)[9]

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[8] The substance of the cited section appears in the revised code as 28 U.S.C. 1336. It reads:

> Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

[9] Section 16 (2), 41 Stat. 491, as amended, 49 U.S.C. 16 (2) provides:

> If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any

flies directly in the face of this Court's express declarations that the right of the United States to bring its proceeding for review depended on whether the order challenged was an "order" within the meaning of the Urgent Deficiencies Act. 337 U. S. at 440-441. Petitioner's confusion results from the fact that this Court went on to hold that a three-judge court, normally convened pursuant to the Urgent Deficiencies Act (see 28 U. S. C. 2325), would not be required to hear the case on remand, and that it might be heard by a single district judge. The Court so held, not because section 16 (2) of the Interstate Commerce Act controlled, but because it concluded that the case was not of the character which Congress had in mind when it provided the expedited appellate procedure which results from a hearing before a three-judge court. *Id.*, pp. 442-443. That the Court found the three-judge procedure inappropriate and unnecessary does not, as Judge Hand stated (R. 76), "change the fact that jurisdiction was not founded on the enforcement provision. Thus [petitioner's] argument based on Section 30 of the Shipping Act falls."

2. Petitioner argues that the Judicial Review Act, if construed to vest jurisdiction to review neg-

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State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated * * *.

ative reparation orders in courts of appeals rather than in single-judge district courts, deprives it of the right to trial by jury guaranteed by the Seventh Amendment to the Constitution.[10] Petitioner also contends that such a scheme of review is discriminatory, in violation of the Fifth Amendment to the Constitution. The argument is that, if a carrier is held liable for reparations by the Board, it has a further opportunity to contest liability by resisting a suit to enforce the award. In such a suit for enforcement, brought pursuant to section 30 of the Shipping Act, the carrier, it is stated, may secure a trial *de novo* before a jury.[11] There is no comparable opportunity, the argument runs, if the shipper is compelled to secure review of an adverse Board determination in an appellate tribunal.

Petitioner's proceeding before the Board, as its complaint filed in the district court plainly shows (R. 6-7), was predicated upon private respondents' alleged violations of the Shipping Act—unjustly discriminatory and unreasonable practices and rates in contravention of sections 14, 16, and 17. Since Congress created the rights which petitioner sought to invoke, Congress plainly had the power to define the remedies which petitioner might pursue. *Amalgamated Utility Workers* v. *Edison Co.*, 309

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[10] "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *."

[11] Section 30 provides that the "findings and order of the [Board] shall be prima facie evidence of the facts therein stated * * *."

U. S. 261, 264. The fact that the statute authorizes the Board to make an award of money for past violations of the Act creates no conflict with the Seventh Amendment. See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48-49.

It would appear, indeed, that prior to this Court's decision in 1939, in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, overruling the so-called negative order doctrine, petitioner would have had no way of securing any review of a Board order denying relief. As Mr. Justice Frankfurter commented in *United States* v. *Interstate Commerce Commission*, 337 U. S. at 446 (dissenting opinion), "[i]t will hardly be suggested that the Constitution requires judicial review of a reparation order by the Commission." The decision in that case, holding that the shipper, the United States, might obtain review, was based solely upon a reinterpretation of the applicable statutes and not upon constitutional necessity.

An action to set aside an order denying reparations, like an action to set aside any other order of the Interstate Commerce Commission or of the Federal Maritime Board, is in the nature of a suit in equity. See discussion in *Rochester Telephone Corp.* v. *United States*, 307 U. S. at 132.[12] As such,

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[12] Petitioner erroneously supposes that, under the rule established by *United States* v. *Interstate Commerce Commission*, a party challenging a denial of reparations by the Interstate Commerce Commission may obtain a trial *de novo* before a single district judge sitting with a jury. There is no such

it necessarily has different incidents than an action at law to enforce an agency order directing the payment of money.[13] It is frivolous to suggest that these differences give rise to a constitutional question.

3. Petitioner argues, finally, that it has a cause of action for fraud and deceit;[14] that the doctrine of primary jurisdiction required it to present its case first to the Board; and that, administrative remedies having been exhausted, its "action at law" should have been entertained by the district court pursuant to that court's general jurisdiction under sections 1331 and 1332 of the Judicial Code. See Pet., pp. 11-12, 22-23.

The argument misconceives the operation of the Shipping Act and incorrectly represents the nature

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intimation in the Court's opinion. On remand, the case was considered by a district judge sitting without a jury and on the basis of the record made before the Commission. The standards applied were those generally applicable to challenged agency action. *United States* v. *Interstate Commerce Commission*, 92 F. Supp. 998, 999, 1002 (D.D.C.), reversed on other grounds, 198 F. 2d 958, 962 (C.A. D.C.), certiorari denied, 344 U.S. 893.

[13] We note that these differences are less extensive than petitioner suggests. Petitioner places heavy emphasis upon the fact that an action to enforce an award brought pursuant to section 30 of the Shipping Act permits the introduction of additional evidence. However, under section 7(c) of the Judicial Review Act, 5 U.S.C. 1037(c), the court of appeals may direct the taking of additional evidence by the agency.

[14] It states, in this connection, that the charter party agreement was fraudulently induced and that "[s]uch fraudulent inducement by representations of future conduct that are mere pretense, which are not, and never were, intended to be kept, is actionable at law" (Pet., p. 12).

of the proceedings which were conducted by the Board. Congress did not commit to the Board the responsibility to determine whether a carrier has falsely induced a shipper to enter a contract, a question of general law within the traditional competence of courts and plainly not involving any special agency expertise. Petitioner invoked the Board's jurisdiction by alleging that the carrier had not properly performed its transportation obligations, i.e., had followed unreasonable and discriminatory practices, in violation of various sections of the Shipping Act, which had the effect of denying petitioner the type of service to which it was entitled under an exclusive charter party. See R. 6-7. Those issues arising under the Shipping Act were, to be sure, within the primary jurisdiction of the Board and, also, within its exclusive original jurisdiction. *Roberto Hernandez* v. *Arnold Bernstein, etc.,* 116 F. 2d 849, 851 (C. A. 2), certiorari denied, 313 U. S. 582. No other issues relating to the tranportation contract were determined by the Board. See the Board's report, R. 20-31.[15]

As both the district court and the court of appeals held (R. 61, 75-77), the complaint filed in the district court was premised upon the alleged invalidity of the Board's order. Assuming, as we be-

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[15] If petitioner had any basis for instituting a common law action for fraud against one or more of the private respondents (which we do not suggest to be the case), it seems plain that neither the United States nor the Federal Maritime Board would have been a proper party to the proceeding.

lieve one must, that exclusive jurisdiction to review Board orders is vested in the courts of appeals, it follows that the complaint was properly dismissed.

CONCLUSION

The decision of the court of appeals is clearly correct. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

OCTOBER TERM, 1954

No. 166

D. L. Piazza Company, a partnership composed of David L. Piazza, Samuel L. Piazza and Providence Piazza, co-partners,

Petitioner,

vs.

West Coast Line, Inc., a corporation, Wessel, Duval & Co., Inc., a corporation, J. Lauritzen, a partnership of Copenhagen, Denmark, and United States of America and Federal Maritime Board,

Respondents.

BRIEF FOR PRIVATE RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (R 74-77) is reported at 210 F (2d) 947-9. The opinion of the United States District Court for the Southern District of New York (R 60-68) is reported at 113 F Supp 193-6.

Jurisdiction

The jurisdictional requisites are set forth on page 2 of the petition.

Constitutional Provisions and Statutes Involved

Petitioner invokes Articles V and VII of the Constitution. The statutes involved are the various sections of the Shipping Act, 1916, 39 Stat. 728, as amended (46 U.S.C. § 801, et seq.), the Interstate Commerce Act, 1887, 24 Stat. 379, as amended (49 U.S.C. § 1, et seq.), the Judicial Review Act, 1950, 64 Stat. 1129 (5 U.S.C. § 1031, et seq.) and the Judicial Code, 1948, 62 Stat. 869, as amended (28 U.S.C. § 1, et seq.) set forth in the appendix to the petition.

Questions Presented

1. Does Section 2 of the Judicial Review Act, 1950 (5 U.S.C. § 1032) vest an appropriate court of appeals with exclusive jurisdiction of petitioner's suit to "set aside, annul and suspend" a Federal Maritime Board order in part granting and in part denying a shipper reparations against carriers by water for alleged violations of Sections 14, 16 and 17 of the Shipping Act, 1916 (46 U.S.C. §§ 812, 815, 816)?

2. If not, may petitioner sue in a district court to review the Board's order under Section 30 of the Shipping Act, 1916 (46 U.S.C. § 829) and to recover reparations under Sections 1331, 1332 of the Judicial Code, 1948 (28 U.S.C. §§ 1331, 1332)?

Statement

In May 1948 petitioner, a shipper, filed a complaint with the Federal Maritime Board's predecessor, the United States Maritime Commission, under Section 22 of the Shipping Act, 1916 (46 U.S.C. § 821) for a cease and desist order and the recovery of $51,132.69 reparations from the private respondents for alleged violations of Sections 14, 16 and 17 of the Shipping Act, 1916 (46 U.S.C. §§ 812, 815,

816) resulting from alleged unjust, unreasonable, discriminatory and prejudicial rates and practices in the performance of an oral charter party with petitioner (R5-7, 13-14, 61-62, 75).

After a full hearing, the Board entered its report (R 13-31) stating, among others, the following findings and conclusions:

> On April 15, 1946 at New York City the private respondents orally chartered the entire refrigerated space of the *s/s Argentinean Reefer* to petitioner for a single shipment of a minimum quantity of fruit from Valparaiso, Chile to New York at the rate of $1.75 per case. The charter made no provision for demurrage.
>
> The rate charged was higher than refrigerated rates contemporaneously in effect on regular liners sailing between Valparaiso and New York. However the private respondents did not operate such a liner service (the vessel having been specially sent in ballast from San Francisco to load petitioner's cargo) and there was no refrigerated space then available on any of the regular liners. Further, the services were not otherwise comparable since the *Argentinean Reefer* was primarily a refrigerated vessel, whereas the liners were primarily non-refrigerated.
>
> When petitioner failed to load the minimum quantity of fruit it had agreed to ship, petitioner's Chilean agent tendered other cargo for carriage to Cristobal, C.Z. and New York which the private respondents accepted, as they were required to do, in order to minimize their damages resulting from petitioner's breach of contract.
>
> The *Argentinean Reefer* arrived at New York on May 17, 1946 and, although petitioner was duly notified of the vessel's readiness to discharge, petitioner refused to accept delivery of its cargo until May 20, 1946. The private respondents charged petitioner $2,500 for having thus detained the vessel.

The Board concluded (R 31) that the freight charges for carriage of petitioner's cargo

> "* * * were not unjustly discriminatory, unreasonably prejudicial or unreasonably disadvantageous and did not constitute an unreasonable practice in violation of section 14, 16 or 17 of the Shipping Act, 1916."

but that the $2,500 charge

> "* * * was, in the absence of any agreement for demurrage, an unreasonable practice in violation of section 17 of the Act."

and awarded petitioner $2,500 reparations against respondent J. Lauritzen and denied petitioner any reparations against either of the other two private respondents.

On December 11, 1951 the Board entered an order denying reargument and directing J. Lauritzen to pay the $2,500 reparations within fifteen days (R 34-35).

On December 17, 1951 J. Lauritzen tendered the $2,500 to petitioner in compliance with the Board's order but, as is conceded on page 6 of the petition and as both lower courts held (R 62, 63, 75) petitioner refused to accept the tender stating judicial review would be sought (R 42).

On December 11, 1952 (R 1)[1] petitioner filed a complaint against respondents in the United States District Court for the Southern District of New York alleging (R 10-12) that the

> "* * * Board's said report, findings and orders are erroneous, invalid, unlawful and void * * *"

for seven reasons and prayed (R 12) that the Board's orders

> "* * * be set aside, annulled and suspended * * *"

---

[1] Section 4 of the Judicial Review Act, 1950 (5 U.S.C. § 1034) fixes a sixty-day limitation for the commencement of proceedings to review orders reviewable under that Act.

upon entry of a judgment against the private respondents for the same $51,132.69 it had sought before the Board.[2]

The private respondents answered with a general denial and also pleaded separate defenses of tender, statute of limitations, laches, want of equity, res judicata and lack of jurisdiction over the subject matter (R 35-42).

Respondents United States of America and Federal Maritime Board moved under Rule 12 (b) of the Federal Rules of Civil Procedure to dismiss the suit for, among other reasons, lack of jurisdiction over the subject matter (R 43).

The District Court granted the motion and held (R 61-68) that since petitioner sought to set aside, annul and suspend orders of the Board which had not been violated by the private respondents, a court of appeals had exclusive jurisdiction of the suit under Section 2 of the Judicial Review Act, 1950 (5. U.S.C. § 1032) and the District Court did not have jurisdiction, as alleged, under either Section 30 of the Shipping Act, 1916 (46 U.S.C. § 829) or Sections 1331 or 1332 of the Judicial Code, 1948 (28 U.S.C. §§ 1331, 1332).

The United States Court of Appeals for the Second Circuit affirmed (R 74-77) and denied a petition for rehearing (R 85).

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[2] The petition variously characterizes the suit as one to "review" (pp. 2, 15), "attack" (pp. 3, 13) and "challenge" (pp. 9, 21, 25, 26) the Board's order denying reparations and one to "recover reparations" or "money damages" (pp. 9, 10, 12).

Argument

I. The petition raises abstract constitutional questions which, under well-settled principles, the Court will refuse to decide.[3]

Petitioner's first two "Questions Presented" and first alleged "Specification of Errors" presume that because the right to jury trial is preserved in a shipper's suit under Section 16 (2) of the Interstate Commerce Act (49 U.S.C. § 16 (2)) to enforce an Interstate Commerce Commission reparation award against a rail carrier, a shipper's suit under Section 30 of the Shipping Act, 1916 (46 U.S.C. § 829) to enforce a Federal Maritime Board reparation award against carriers by water must also be tried before a jury.[4]

However, petitioner's complaint[5] shows on its face, and both lower courts held (R 61, 76), that petitioner did not sue to *enforce* the Board's order denying petitioner substantially all the reparations it sought.[6] Further, since

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[3] *Rescue Army* v. *Mun. Court* 331 US 549, 568-74.

[4] It is unnecessary to determine the validity of this assumption in order to dispose of the petition. However, it should be noted that, unlike § 30 of the Shipping Act, § 16 (2) of the Interstate Commerce Act expressly provides that suits to enforce I.C.C. monetary orders "shall proceed in all respects like other civil suits for damages" and § 22(1) of the Interstate Commerce Act (49 U.S.C. § 22) (1) contains a clause saving existing common law and statutory remedies which has no counterpart in the Shipping Act. *U.S. Navigation Co.* v. *Cunard S.S. Co.* 284 US 474, 485-6. Accordingly, it seems improbable that there is a constitutional right to jury trial of any § 30 claims cognizable under maritime law. *Crowell* v. *Benson* 285 US 22, 45.

[5] See particularly paragraph 19 and the Wherefore clause (R. 10-12).

[6] A suit to enforce an order of the Board "is one which seeks to compel the carrier to whom the order is directed to yield obedience to its command." *Illinois Cent. R.R. Co.* v. *Public Utilities Comm.* 245 US 493, 502. Conversely, a suit to set aside the Board's order is one, such as this, which assails the validity of the order and seeks

respondent, J. Lauritzen, duly tendered the reparations awarded to petitioner, there has been no "violation" of the Board's order within the meaning of Section 30 of the Shipping Act, 1916, and both lower courts so held (R 63, 76).

Since petitioner did not seek review of the Board's order under the Judicial Review Act, 1950 (5 U.S.C. § 1031, et seq.) the claimed unconstitutionality of that Act is based merely upon assumed potential invasion of rights. *Ashwander* v. *T.V.A.* 297 US 288, 324-5. In challeging the constitutionality of the statutory proceeding *in limine*, petitioner invites the Court to condemn untried incidents of the Judicial Review Act upon speculative inquiry which, of course, the Court will decline to do. *Anniston Mfg. Co.* v. *Davis* 301 US 337, 355.

Petitioner's excuses for failing to resort to the review procedure specified by the Act would be legally sufficient only if it could convince the Court that the Act is patently unconstitutional. *Yakus* v. *U.S.* 321 US 414, 435.

Petitioner's fifth "Question Presented" is hypothetical on its face in that it asks the Court to formulate constitutional rules broader than the facts require.

This leaves petitioner's third and fourth "Questions Presented" as amplified by its second, third and fourth alleged "Specification of Errors" which, put somewhat more concisely, are the Questions Presented, supra, page 2.

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damages inconsistent with those awarded by the Board. *Venner* v. *Michigan Cent. R.R. Co.* 271 US 127, 130; c.f. *Central New Eng. R. Co.* v. *Boston & A.R. Co.* 279 US 415, 420

II. There can be no question as to the power of Congress to vest courts of appeals with exclusive jurisdiction to review Federal Maritime Board orders disposing of shippers' complaints against water carriers for alleged violations of the Shipping Act, 1916.

As Mr. Justice Reed tersely stated in *Oklahoma* v. *U.S. Civil Serv. Comm.* 330 US 127, 137:

> "Congress has power to fix conditions for review of administrative orders."

And as Mr. Justice Douglas observed in *Switchmen's Union of N.A.* v. *Nat. Mediation Board* 320 US 297, 301:

> "In such a case the specification of one remedy normally excludes another. [citing cases]"

There is no need here to decide whether that constitutional power stems from the commerce clause (Art. 1, § 8, Cl. 3) or the authority over inferior courts (Art. 3, § 1), as buttressed by the necessary and proper clause (Art. 1, § 8, Cl. 18). Congress' power under either grant is sufficient.[7]

Also, since Section 4 of the Judicial Review Act, 1950 (5 U.S.C. § 1034) provides that the review proceeding "shall be brought against the United States", the United States is a necessary party defendant.[8]

And it was settled at least as early as *Murray* v. *Hoboken Land & I. Co.* 18 How. (59 US) 272, 283, that if the Government consents to be sued, it

> "• • • may yield this consent upon such terms and under such restrictions as it may think just."

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[7] *Crowell* v. *Benson* 285 US 22, 39; *N.L.R.B.* v. *Cheney Lumber Co.* 327 US 385, 388.

[8] Similarly, the Government is an indispensable party to suits to set aside I.C.C. orders. *Lambert Run Coal Co.* v. *Baltimore & O. R. Co.* 258 US 377, 382.

So the question here is whether the plain language of the Judicial Review Act, 1950 means what it says, as both lower courts held (R 66-68, 77), or whether, notwithstanding its plain language, the Judicial Review Act merely gives courts of appeal exclusive jurisdiction to review quasi-legislative orders of the Board, as petitioner urges.

III. The decisions below are clearly correct.

A. The Judicial Review Act, 1950 vests exclusive jurisdiction in courts of appeals to review quasi-judicial Board orders of the sort here involved.

It is doubted that the language of the Judicial Review Act "is sufficiently ambiguous to require construction".[9] If there is room for doubt, it is completely dispelled by the Act's legislative history as outlined on pages 9-11 of the Government's brief in opposition to the petition. Borrowing the language of Mr. Chief Justice Hughes in *Detroit Trust Co.* v. *The Barlum* 293 US 21, 38:

> "To hold that [petitioner's suit] is not within the Act which the Act itself [as amplified by its legislative history] states is within it, is not to construe the Act but to amend it."

B. The Judicial Review Act, 1950, as construed below, does not deprive petitioner of any constitutional right to jury trial.

Petitioner's "Seventh Amendment Question" assumes a pre-existing right to jury trial in a suit to review a Board order under the procedure outlined in *United States* v. *I.C.C.* 337 US 426.[10]

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[9] *U.S.* v. *Am. Union Transport, Inc.* 327 US 437, 445.

[10] It is noteworthy that under the "negative order" doctrine, which flourished for more than twenty-five years, *no* judicial review, either with or without a jury, of administrative orders in part granting and in part denying reparations, was allowed. *George Allison & Co.* v. *U.S.* 296 US 546, aff'g (S.D.N.Y.) 12 F. Supp. 862, 864.

There is not one word in *United States* v. *I.C.C.* supra, about any right to jury trial. None was had on remand to the district court.[11]

It is clear that here, as in *United States* v. *I.C.C.*, supra, there is no constitutional right to trial by jury because: (a) by virtue of Section 4 of the Judicial Review Act, 1950 (5 U.S.C. § 1034) the United States is a necessary party defendant;[12] (b) the suit is in equity;[13] (c) the proceeding is statutory;[14] and (d) since the doctrine of administrative finality limits the scope of judicial review to "questions affecting constitutional power, statutory authority and the basic prerequisites of proof",[15] there is no factual issue and no constitutional right to trial by jury.[16]

Unquestionably a jury trial may be had of an action under Section 16 (2) of the Interstate Commerce Act (49 U.S.C. § 16(2)) to enforce an Interstate Commerce Commission reparation award. However, as is conceded on page 10 of the petition, the Judicial Review Act, 1950 (5 U.S.C. § 1031, et seq.) does not embrace actions to enforce reparation awards and, as both lower courts held (R 61, 76; and see cases cited in footnote 6, supra) petitioner did not sue to enforce the Board's order denying substantially all of the reparations it sought.

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[11] *United States* v. *I.C.C.* (D.D.C.) 92 F. Supp. 998, rev'd on other grounds 198 F. (2d) 958, cert. denied 344 US 893.

[12] There is no constitutional right to jury trial of an action against the Government. *Galloway* v. *U.S.* 319 US 372, 388.

[13] *U.S.* v. *Morgan* 307 US 183, 191. The 7th Amendment does not guarantee jury trial of suits in equity. *U.S.* v. *Louisiana* 339 US 699, 706.

[14] There is no constitutional right to trial by jury of a statutory proceeding. *N.L.R.B.* v. *Jones & Laughlin Steel Corp.* 301 US 1, 48.

[15] *Rochester Tel. Corp.* v. *U.S.* 307 US 125, 140.

[16] *I.C.C.* v. *Brimson* 154 US 447, 488.

C. The Judicial Review Act, 1950, as construed below, does not deny petitioner due process.

Petitioner's "Fifth Amendment Question" (not raised below) is whether the Judicial Review Act, 1950 (5 U.S.C. § 1031, et seq.), which vests exclusive jurisdiction in courts of appeals of a shipper's suit to set aside a Board order denying reparations, denies the shipper due process because Section 30 of the Shipping Act, 1916 (46 U.S.C. § 829) provides for district court trial of a shipper's suit to enforce a Board order granting reparations.[17]

We find no case invalidating "split review" of Interstate Commerce Commission orders[18] and analogous statutes providing for split review of Securities & Exchange Commission orders have recently been held constitutional.[19] The Court apparently did not feel in *Far East Conf.* v. *U.S.* 342 US 570, 577, that split review of future Federal Maritime Board orders would violate the 5th Amendment.

Petitioner complains that there is no good reason for split review of Board orders.[20] The reason obviously lies

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[17] Petitioner suggests that a shipper may not introduce "new evidence" in a proceeding under the Judicial Review Act, although it can in a § 30 proceeding. Aside from doubts as to the latter proposition and the rule that "impossibility of proof may not be assumed", *Anniston Mfg. Co.* v. *Davis* 301 US 337, 352, § 7 (c) of the Judicial Review Act (5 U.S.C. § 1037 (c)) expressly permits the introduction of additional evidence.

[18] i.e., district court enforcement, with the right to jury trial, of I.C.C. reparation awards under § 16 (2) of the Interstate Commerce Act (49 U.S.C. § 16 (2)) and three-judge review, without a jury, of other I.C.C. orders by the commerce court from 1910-1913 (36 Stat. 539), and by district courts under the Urgent Deficiencies Act (38 Stat. 219) and §§ 1336, 2321-2325 of the Judicial Code, 1948 (28 U.S.C. §§ 1336, 2321-2325) from 1913 to the present.

[19] *General Protective Com.* v. *S.E.C.* 346 US 521.

[20] Courts are concerned with Congressional power, not the propriety of the legislation. *North America Co.* v. *S.E.C.* 327 US 686, 710.

in the distinction between Board orders involving matters of public interest,[21] and those which do not.[22] And the desire for simplicity and expedition which motivated passage of the Judicial Review Act[23] is at least as compelling with respect to review of quasi-judicial Board orders as quasi-legislative orders.

However, apart from this apparent explanation, the Court will presume that Congressional exercise of the power to regulate commerce

> "• • • rests upon some rational basis within the knowledge and experience of the legislature." *U.S.* v. *Carolene Prod. Co.* 304 US 144, 152.

and

> "• • • the methods which [Congress] employs to carry out its purposes are beyond attack without a clear and convincing showing that there is no rational basis for the legislation; that it is an arbitrary fiat." *Carolene Prod. Co.* v. *U.S.* 323 US 18, 31-2.

Due process does not guarantee any particular form of procedure,[24] or judicial process,[25], or jury trial,[26] or more than one hearing.[27] However, apart from these rules and the power of Congress under Article III and the commerce

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[21] *North Dakota* v. *Chicago & N.W.R. Co.* 257 US 485, 490.

[22] *United States* v. *I.C.C.* 337 US 426, 441-3.

[23] H. Rep. No. 2618, 81st Cong. 2nd Sess., 1950 U.S. Code Cong. Serv. 4303, 4306.

[24] *N.L.R.B.* v. *Mackay Radio & T. Co.* 304 US 333, 351.

[25] *Crowell* v. *Benson* 285 US 22, 47.

[26] *Ex Parte Wall* 107 US 265, 289.

[27] *Switchmen's Union* v. *Nat. Med. Bd.* 320 US 297, 303. As noted footnote 10, supra, under the "negative order" doctrine many administrative orders were not judicially reviewable. Indeed, for the first nineteen years of the Interstate Commerce Commission's existence, none of its orders could be judicially reviewed. *U.S.* v. *Los Angeles S.L.R. Co.* 273 US 299, 309.

clause to create unique review procedures,[28] the United States is a necessary party defendant in a suit to set aside Board orders, and consent to sue the Government is not a property right protected by the 5th Amendment.[29]

While it is certainly true, as the Court recently held,[30] that discrimination may be so unjustified as to violate the 5th Amendment, mere lack of uniformity in Congressional exercise of the power to regulate commerce does not constitute a denial of due process.[31]

IV. The District Court had no jurisdiction under Sections 1331, 1332 of the 1948 Judicial Code.

In *Texas & P.R. Co.* v. *Abilene Cotton Oil Co.* 204 US 426, 436, 448, probably the leading case on the doctrine of primary jurisdiction, the Court held that a shipper could not sue at law to recover damages from a rail carrier for exaction of an alleged unreasonable rate without prior recourse to the Interstate Commerce Commission.

Petitioner argues, however, that because Section 9 of the Interstate Commerce Act (49 U.S.C. § 9), unlike the Shipping Act, 1916 (46 U.S.C. § 801, et seq.), gives the shipper an option to sue for damages in a district court, the Federal Maritime Board's jurisdiction is merely "preliminary" and not primary.[32]

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[28] *Yakus* v. *U.S.* 321 US 414.

[29] *Lynch* v. *U.S.* 292 US 571, 581.

[30] *Bolling* v. *Sharp* ____ US ____, 98 L. ed. 591, 593, 74 S. Ct. 693, 694.

[31] *Currin* v. *Wallace* 306 US 1, 14.

[32] The cases cited by petitioner to support this contention (*Lehigh Valley R. Co.* v. *Clark* (C.C.A. 3rd) 207 Fed. 717, rev'd 238 US 473; *I.C.C.* v. *Western N.Y. & P.R. Co.* (W.D. Pa.) 82 Fed. 192 were suits to *enforce* I.C.C. orders where prior I.C.C. action was nec-

Despite the right of election afforded by Section 9, where the shipper's claim involves questions of reasonableness within the Commission's primary jurisdiction, the shipper may not sue for damages without a finding by the Commission that the rates or practices giving rise to the claim are unreasonable and, if the shipper elects to file a complaint for reparations with the Commission, the shipper is precluded from later initiating an original district court action for the same damages.[33] A shipper suing to enforce a reparation order is not entitled to recover more than the amount of the award and no such suit is permitted if the carrier pays the award.[34] If the administrative order is legally insufficient, a court may not grant the administrative relief sought, but must remand the proceedings for further administrative action.[35]

The exclusive primary jurisdiction of (what is now) the Federal Maritime Board was clearly stated in *U.S. Navigation Co.* v. *Cunard S.S. Co.* 284 US 474, which was cited and followed in *Swayne & Hoyt, Ltd.* v. *U.S.* 300 US 297, 304, where Mr. Justice Stone observed that:

> "Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judg-

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essarily a "condition precedent", else there would have been nothing to enforce.

Quite apart from the fact that the *Lehigh Valley* case, supra, was reversed on writ of error, the suggestion that the Third Circuit's opinion there conflicts with the Second Circuit's opinion below overlooks, among others, the difference between a suit to enforce an I.C.C. order, and a suit to set aside an F.M.B. order after passage of a statute giving courts of appeals exclusive jurisdiction of the latter. The Third Circuit has recently had occasion to recognize the exclusive jurisdiction of courts of appeals to review F.M.B. orders. *Baltimore & O. R. Co.* v. *U.S.* (C.C.A. 3rd) 201 F (2d) 795, 208 F (2d) 734.

[33] *United States* v. *I.C.C.* 337 US 426, 434, 437.

[34] *Baltimore & O.R. Co.* v. *Brady* 288 US 448, 457, 458.

[35] *Texas & P.R. Co.* v. *I.C.C.* 162 US 197, 238.

ment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic."

To concede that the district court had jurisdiction of petitioner's suit under Sections 1331, 1332 of the 1948 Judicial Code:

> "* * * would be to turn back the clock on at least half a century of administrative law." [36]

V. There is no conflict between the decisions below and the Court's decision in *United States* v. *Interstate Commerce Commission* 337 US 426.

Petitioner's assertions that the decisions below conflict with *United States* v. *I.C.C.*, supra, and that the district court had jurisdiction under Section 30 of the Shipping Act, 1916 (46 U.S.C. § 829) are premised on the erroneous contention that *United States* v. *I.C.C.*, supra, held that the district court's review jurisdiction was under Section 16 (2) of the Interstate Commerce Act (49 U.S.C. § 16 (2)), rather than that part of the Urgent Deficiencies Act, 1913 which was Section 41 (28) of the 1946 Judicial Code and which has been substantially re-enacted as Section 1336 of the present Judicial Code (28 U.S.C. § 1336), as both courts held below (R. 64-65, 76).

In *United States* v. *I.C.C.*, supra, the Government did not even allege jurisdiction under Section 16 (2) of the Interstate Commerce Act [37] and the Court's opinion by Mr.

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[36] Mr. Justice Douglas in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 US 381, 400.

[37] See jurisdictional allegations set forth in the district court's opinion, 78 F. Supp. 580, 581.

Justice Black thrice states that the district court's jurisdiction was under the Urgent Deficiencies Act.[38]

Petitioner's argument that *United States* v. *I.C.C.*, supra, could not have found jurisdiction under the Urgent Deficiencies Act because that Act required review by a three-judge court simply paraphrases one of the main grounds of the dissenting opinion.[39]

VI. The petition does not raise any important federal question which has not been settled by the Court.

In an effort to escape the 60-day limitation of Section 4 of the Judicial Review Act, 1950 (5 U.S.C. § 1034) petitioner asks the Court to overrule a host of prior decisions by (a) extending the Fifth and Seventh Amendment guarantees so as to deprive Congress of its paramount powers over interstate and foreign commerce, the jurisdiction of inferior federal courts and suits against the United States, and (b) emasculating the doctrines of primary jurisdiction and administrative finality so as to deprive the Federal Maritime Board of its exclusive primary jurisdiction over complaints based on alleged unjust, unreasonable, discriminatory and prejudicial rates and practices in violation of the Shipping Act, 1916.

Far from being important and unique, the questions raised are so insubstantial that certiorari should be denied. *Mc Carthy* v. *Bruner* 323 US 673.

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[38] "* * * the order thus falls squarely within the type made subject to judicial review by § 41 (28)." Id., p 433.

"Accordingly we hold that § 9 does not impair the right of shippers to obtain judicial review of adverse Commission orders under § 41 (28) * * *." Id., p 440.

"* * * we hold that a Commission order dismissing a shipper's claim for damages * * * is an 'order' subject to challenge under 28 U.S.C. (1946 ed.) § 41 (28)." Id., pp 440-1.

[39] Id., pp 452-5, 457, 459-61.

Conclusion

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 166

D. L. PIAZZA COMPANY, a partnership composed of DAVID L. PIAZZA, SAMUEL L. PIAZZA and PROVIDENCE PIAZZA, co-partners,

Petitioner,

vs.

WEST COAST LINE, INC. a corporation, WESSEL, DUVAL & CO., INC., a corporation, J. LAURITZEN, a partnership of Copenhagen, Denmark, and UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT.

Although on June 30, 1954, counsel for the private respondents, West Coast Line, Inc., Wessel, Duval & Co., Inc., and J. Lauritzen, accepted in writing service of the record and the petition for writ of certiorari as shown by the proof of service filed herein, no brief in opposition to the petition has been filed on behalf of the private respondent water carriers against whom the petitioner, a shipper, seeks money damages in this proceeding in

the form of reparations for rates and charges wrongfully obtained by them from petitioner.

The only brief filed in opposition to the petition has been filed on behalf of the respondents, United States of America and Federal Maritime Board (sometimes hereinafter referred to collectively as "the Government"). The Government does not dispute the correctness of the Statement of the Case in the petition. Its own Statement, however, is misleading because it misrepresents the nature of the proceedings instituted by the petitioner, both before the administrative agency involved and in the District Court. The complaints filed before the Board and in the District Court both charged that the receiving, handling and delivering of plaintiff's cargo by the private respondents were unjust, unreasonable and conducted under the false pretense that the private respondents were to carry the cargo under an exclusive use voyage Charter Party Agreement at rates highly in excess of applicable liner service rates, and that although such rates were paid by the petitioner, the private respondent carriers rendered liner service with ensuing deviation rather than the exclusive, direct voyage promised (R. 5, 6, 7). It is at once apparent that the primary purpose of the complaint and the nature of the proceedings filed in the District Court was not to find, as the Government's Statement would have it, that "the Board's 'report, findings and orders are erroneous, invalid, unlawful and void'" (Government's Brief, p. 7), but was to recover a judgment for money damages as reparations (R. 12).

ARGUMENT.

1. The root of the controversy herein concerns money damages and therefore judicial review of the Board's order can be had only under Section 30 of the Shipping Act of 1916, as amended, (46 U.S.C. 829).

(Reply to point 1 of Government's Argument, pp. 9-13)

The brief of the Government travels on a fallacy that misconstrues the nature of this proceeding.

The Government endeavors to transform a proceeding that seeks the recovery of money damages for past wrongs into a proceeding in equity. Thereby it seeks to justify the action of the courts below—on the *sole* basis that the action is "plainly (*sic*) one to set aside the order of the Board" (Government's Brief, p. 8).

This Court, in the case where the Government itself was a shipper and (like the petitioner here) sought relief notwithstanding an administrative order *denying* to it reparations, described the nature of the controversy involved as follows: "While the Government here does not seek *enforcement* of a Commission order for the payment of money, *the root of the controversy concerns the payment of money damages* under 49 U.S.C. §§ 8, 9." *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 443, (Our emphasis and see our Petition, pp. 22-23).

Similarly, the root of the controversy in the instant reparations case concerns the payment of money damages.

The Government's Brief attempts to distinguish the holding in *U. S.* v. *Interstate Commerce Commission*, 337

U.S. 426, by contending that there this Court found jurisdiction to entertain proceedings that challenged administrative determination reached under the Interstate Commerce Act on one isolated section of another statute—the Urgent Deficiencies Act— *but* that section merely says that challenge shall be allowed—without stating whether that jurisdiction should be in one kind of court or another (28 U.S.C.A. 1336, quoted at p. 5a of the Appendix to the Petition). Herein the Government concedes that judicial review of an administrative order provided *by the Urgent Deficiencies Act* would be by a *three-judge* court "normally (*sic*) convened". (Government's Brief, p. 13, and see 28 U.S.C. 2325, quoted at page 5a of the Appendix to the Petition.)

The Government's Brief wholly overlooks that the only proceeding authorized by the Urgent Deficiencies Act is, indeed, a three-judge court; whereas, this Court recognized that Section 16 (2) of the Interstate Commerce Act put proceedings for the recovery of reparations in a class by themselves for the purposes of further judicial proceedings following administrative determinations, and accordingy held that such review should be before the single-judge district court contemplated by said Section 16 (2) of the Interstate Commerce Act. This Court's decision, therefore, under such statutes as Section 16(2) of the Interstate Commerce Act, involved in *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, and *the parallel Section 30 of the Shipping Act*, relied upon by the petitioner, sets apart reparation proceedings for recovery of money damages for trial by a one-judge court—which carries the right to a jury.

Section 16(2) of the Interstate Commerce Act and Section 30 of the Shipping Act are deliberately parallel (see pages 4-5 of the Petition). This Court, under the first

of these deliberately parallel sections, held that a one-judge district court has power to act whether the suit relies on or whether the suit attacks the administrative result as respects the reparations sought. This Court's reasoning was, specifically (337 U.S. at 443):

> "For actions to enforce Commission orders awarding reparation, and actions to challenge Commission orders denying reparations, basically involve the same parties, the same disputes, the same claims for money damages, and the same statutes. We think the orders *in both instances* should be reviewed by the same one-judge tribunal." (Our emphasis).

It is submitted that a construction to limit these deliberately parallel sections of the Interstate Commerce Act and the Shipping Act to *enforcement* of administrative orders, as the superficially verbal argument of the Government would now have it, is contrary to the holding of this Court, above quoted (and contrary to the position of the Government when the Government was the shipper.)

It is submitted further that in such a statutory situation, whether the proceeding arises under the Interstate Commerce Act or under the Shipping Act, it is the *reparations* proceeding that this Court by statutory construction in *United States* v. *Interstate Commerce Commission* holds is carved out from the three-judge proceeding, that acts without a jury and on the administrative record alone. For Congress cannot be supposed to have given the plaintiff, who relies on the administrative result, the advantages of a jury trial—while denying them to the plaintiff who challenges the administrative result. Beyond the considerations of logic and fairness supporting that construction is the further consideration that any other construction would raise grave doubts of the Constitutional validity of the leigslation.

2. The construction of the statutes by the court below does result in an unconstitutional deprivation of the right of jury trial to which the parties to reparation proceedings are entitled under the Seventh Amendment and does permit such palpable discrimination against a shipper challenging the administrative order as to be violative of the Due Process Clause of the Fifth Amendment.

(Reply to point 2 of Government's Argument, pp. 13-16)

The Government argues that the fundamental constitutional objections raised by petitioner are without substance. Here again appears the fallacy on which the brief of the Government travels. The argument is made by the Government that petitioner's proceeding is predicated upon rights created by Congress and that Congress therefore had the power to define the remedies which petitioner might pursue. As was pointed out at pages 11-12 of our Petition, the Shipping Act gives and codifies many rights that sound only at common law. See: 46 U. S. C. §§ 812, 815, 816. As we there pointed out, promissory misrepresentation where moneys have been obtained by fraudulent pretense is actionable at law. *Kaufman* v. *John Block and Co.*, 60 F. Supp. 992, 993 (S. D. N. Y., 1945). The complaint herein charges that the respondent carriers resorted to unfair and discriminatory methods under a fraudulent pretense to induce the petitioner to pay rates highly in excess of the applicable rates for the services that were actually rendered in lieu of what was fraudulently held out. (R. 5, 6, 7) Such fraudulent inducement by representations of future conduct that are mere pretense, which are not and never were intended to be kept, is actionable at law (Auth. cit.). As we pointed out in our petition at pages 10 and 12, the Shipping Act does not give the shipper the election to proceed at law in the first instance without preliminary recourse to the Board, yet the argument of the

Government seeks to limit the review of a denial of reparations to the shipper to a proceeding "in the nature of a suit in equity." (Government's Brief, p. 15). The early history of proceedings under the Interstate Commerce Act convincingly rejects the extraordinary notion that review of *reparations* proceedings—proceedings to recover money damages for past wrongs—could be by resort to equity. Indeed, until the Act was amended, the Interstate Commerce Commission itself refused to award *reparations* on the sole ground that under the Seventh Amendment an award would be a nullity where review of the order could be only by resort to a court of equity—as was provided by the original language of the Act.

In the case of *Lehigh Valley R. Co.* v. *Clark*, 207 Fed. 717 (C. A. 3, 1913), the Court of Appeals for the Third Circuit, after recapitulating the early history of the Interstate Commerce Act, clearly stated the distinction between the provisions of the Interstate Commerce Act governing reparations cases and those governing the rule-making functions of the administrative agency, which the Government's present argument would tend to merge, stating at pages 723, 724:

> "As to the provisions covering reparation cases, Congress is no longer dealing with those matters which concern the practical management and conduct of the business of carriers and the regulation thereof *in futuro*, in the interests of the public generally, but is conferring a private right of action upon those who have suffered actual damage, by reason of such carriers' violation of some requirement of the Act. *The conferring of such right of action, though incident to its power to regulate commerce, is not a regulation thereof.* It makes redress of a private injury actually suffered, possible. It concerns the past and not the future conduct of the carrier, and, though this right of action for damages is qualified by mak-

ing it depend in certain cases upon the precedent award of reparation by the Commission, such award is not of the nature of the administrative functions conferred on that body.

"In the case of *Western N. Y. & P. R. Co.* v. *Penn Refining Co.*, 137 Fed. 343, 70 C. C. A. 23, which was decided with reference to the original Act, as amended by the Act of 1889, we said:

> 'In the proceedings at law under section 16, as amended, for the enforcement of an order or requirement of the commission, *the parties are entitled to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right.* The procedure contemplated by the act and, unless waived, *required by the Constitution,* is jury trial, accompanied with the usual safeguards furnished by a proper application of the principles of evidence and the proper submission of the case to the jury.'

"The judgment in this case was affirmed by the Supreme Court, with no criticism of the language quoted. *Penn Refining Co.* v. *West N. Y. & P. R. R. Co.*, 208 U. S. 208, 28 Sup. Ct. 268 52 L. Ed. 456." (Our emphasis)

The case upon which the Government relies chiefly to deny the right to jury trial, namely, *Amalgamated Utility Workers* v. *Edison Co.*, 309 U. S. 261, 264, was a contempt proceeding to enforce an injunction! In the other case relied upon by the Government, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48-49, this Court made a clear-cut distinction as to the application of the Seventh Amendment where the proceeding authorized by the statute is in the nature of a suit at common law and where it is one unknown to the common law. We hardly suppose that the Government means by its argument to renew the contention recently

and emphatically rejected by Judge Fake in *United States* v. *Jepson*, 90 F. Supp. 983. The Government there sought to recover rents collected by the defendant in excess of maximum legal rents established by the Emergency Price Control Act, contending, as it does here, that since the action is of statutory origin (and even an emergency right created by Congress) defendant was not entitled to a jury trial. Judge Fake, in holding that rights of litigants to recover money damages have long been recognized as suits at common law in this country, stated at pages 984-985:

> "Long prior to our independence there had grown up under original writs certain well-defined actions at common law, among them, the action of debt covering, among other causes, suits for statutory penalties and *qui tam* actions. See Chitty on Pleadings, Vol. I, Seventh American Edition, page 126. That such an action was recognized as a suit at common law in this country, in the year 1795, is made sparklingly clear in *U. S.* v. *Mundell*, 27 Fed. Cas. 23, No. 15,834. In that case the court had before it the problem as to just what was meant by 'trials at common law' and it is there pointed out that 'A distinction is sometimes taken between a suit at common law and a suit upon a statute, where the latter is grounded upon different principles from the former, in which case perhaps it may properly be said that the one is a trial at common law, the other upon the statute • • • thus, in this case, though it be an action of debt, which is a common law action, and will be tried in a common law manner, • • • whatever, therefore, the laws order anyone to pay, that instantly becomes a debt which he hath beforehand contracted to discharge.'"

Accordingly, Judge Fake concluded, at page 986:

> "It is my thought that when a federal statute embraces a common-law form of action, that action does

not lose its identity merely because it finds itself enmeshed in a statute. The right of trial by jury in an action for debt still prevails whatever modern name may be applied to the action. *To hold otherwise would be to open the way for Congress to nullify the Constitutional right of trial by jury by mere statutory enactments.* It is by such methods that courts lose their power to enforce the Bill of Rights.

"An order will be entered herein providing for a trial by jury on the issues joined on the first count of the complaint. The trial of the equitable issues will be stayed abiding the event of the jury trial." (Our emphasis)

The Government relies upon the comment of Mr. Justice Frankfurter in his dissenting opinion in *United States* v. *Interstate Commerce Commission*, 337 U. S. at 446 to the effect that it will hardly be suggested that the Constitution requires judicial review of a reparation order by the Commission. Mr. Justice Frankfurter there states that such a notion is precluded by *Cary* v. *Curtis*, 3 How. 236. Since that case held that an action of assumpsit for money had and received would not lie against the collector of the customs for the return of duties received by him in his official capacity and which he was required by Act of Congress to place to the credit of the Treasurer of the United States, its holding cannot govern the Constitutional issues here presented.[1] The early history of the parallel Interstate Commerce Act and its judicial construction emphasizes that insofar as reparation proceedings were concerned, "the procedure contemplated by the Act and * * * required by the Constitution,

[1] Apart from the ominous implications (see dissent of Story, J.) of the doctrine of Cary v. Curtis—that sovereign immunity protects the person who, under color of office but without right in law, takes the money of the citizen from answering to any tribunal (whether law or equity) save by the sovereign's grace and consent—such a doctrine has no relevance here. It is not the Government, but the private respondents, who wrongfully took and wrongfully retain the petitioner's money.

is a jury trial accompanied with the usual safeguards furnished by a proper application of the principles of evidence and the proper submission of the case to the jury." (*Western N. Y. & P. R. Co.* v. *Penn Refining Co.*, 137 Fed. 343, (C. A. 3, 1905), aff'd 208 U. S. 208. Furthermore, as we pointed out at pages 10-13 of our Petition, and to which the Government's brief makes no answer, this Court in the case of *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448 at 458, recognized the Constitutional right of trial by jury for shipper and carrier alike in reparation proceedings, when this Court pointed out that Congress, under Section 9 of the Interstate Commerce Act, as amended, expressly gave the shipper the option to seek reparation in the first instance before the district court, where he could have a trial by jury. Section 22 of the Shipping Act (46 U. S. C. 821) gives no such election but requires shippers claiming reparations to resort to the Administrator in the first instance in all cases. To construe the Judicial Review Act (5 U. S. C. 1032) to deprive the shipper of his constitutional right to a jury trial in a reparation proceeding to recover money damages for past wrongs renders that Act plainly unconstitutional and ignores the clearly constitutional alternative spelled out by this Court in the *United States* v. *Interstate Commerce Commission*, 337 U. S. 426.[2]

It is also significant that the Government's argument does not meet the Fifth Amendment question set forth in our petition at pages 13-15. The construction of the statutes urged by the Government does deny to the shipper

[2] The Government does not meet the construction question governed by the cardinal principle enunciated by this Court in Crowell v. Benson, 285 U. S. 22, 62 and reaffirmed in Ashwander v. Tennessee Valley Authority, 297 U. S. 288 that when the validity of an Act of Congress is drawn in question and even if a serious doubt of constitutionality is raised, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. See our Petition at pages 12 and 13 to which the Government makes no answer.

who attacks the administrative order all right to jury trial but the statutes plainly give the carrier, against whom the shipper would enforce exactly the same reparations claim, the right to review in a one-judge district court where he may have trial by jury. The discrimination is at once apparent and is palpable, gross and baseless. *Bolling* v. *Sharpe*, 347 U. S. 497, 74 S. Ct. 693, 694 (May 17, 1954). To this the Government has made no answer.

3. The Question of Jurisdiction under the Judicial Code, independent of the Shipping Act.

(Reply to point 3 of Government's Argument, pp. 16-18)

The Government's argument here continues to travel on the same fallacy that appears throughout its brief. Its argument confuses the distinction between a reparations proceeding—wherein the "basic" matter is the shipper's right to recover money damages as this Court put it in the case of *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 443—with the totally different situation in which the only relief sought is *quia timet* to enjoin official action. The Government's argument further ignores the fundamental fact that the Shipping Act *codifies* many rights that sound only at common law and yet requires the shipper to resort in the first instance to the Administrator for relief of violations of such rights. Such violations are charged in the complaint filed by the petitioner in the District Court (R. 5, 6, 7). The Government makes no answer to the authorities cited at pages 22-23 of the Petition that describe such proceedings before the administrative body simply as a necessary condition precedent to the bringing of an action at law.

CONCLUSION.

The private respondent carriers have made no answer to the Petition. The Government's brief urges a construction of the statutes that more than raises grave doubts as to the Constitutional validity thereof and that is in conflict with decisions of this Court and Courts of Appeals of other circuits under parallel provisions of the Interstate Commerce Act and that would create direct conflict between the interpretation of such parallel legislation.

For the reasons hereinabove stated and set forth in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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